

NORTH CAROLINA COURT OF APPEALS REPORTS

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OF
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-
1. Appointed Chief Judge by Chief Justice Burley B. Mitchell, Jr. and took office 1 May 1998 to replace Gerald Arnold, who resigned 30 April 1998.
 2. Appointed by Governor James B. Hunt, Jr. and sworn in 8 July 1998.
 3. Appointed to Supreme Court by Governor James B. Hunt, Jr. and sworn in as Associate Justice 1 October 1998.

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| | |
|-----------------|---------|
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|-----------------|---------|

-
1. Appointed and sworn in 3 August 1998 to replace Paul M. Wright who retired 31 May 1998.
 2. Retired 31 July 1998.
 3. Deceased 30 July 1998.

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*Special Counsel to the
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HAMPTON DELLINGER

*Deputy Attorney General for
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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

THE ESTATE OF ADA T. SMITH, BY AND THROUGH HER EXECUTOR, JAMES T. SMITH; ADA KELLY SMITH HINES; JANE ELIZABETH SMITH YEARGAN; THE ESTATE OF MARIE SMITH WALLACE BY AND THROUGH HER EXECUTOR, JAMES T. SMITH; MARVIN SIMEON HONEYCUTT, INDIVIDUALLY AND AS SECRETARY OF SMITH-S, INC., SUE WORTHINGTON SMITH; JAMES THOMAS SMITH, INDIVIDUALLY, AS TRUSTEE OF THE W. H. SMITH TRUST, AS TRUSTEE OF THE ADA T. SMITH TRUST, AND AS PRESIDENT OF SMITH-S, INC., AND WIFE, DOROTHY COBB SMITH, ALFRED LEWIS SMITH, INDIVIDUALLY AND AS VICE-PRESIDENT OF SMITH-S, INC., AND WIFE, JEAN NEWKIRK SMITH; AND SMITH-S, INC., A NORTH CAROLINA CORPORATION, PLAINTIFFS V. SAM B. UNDERWOOD, JR.; JAMES G. SULLIVAN; AND JOHN C. PROCTOR & COMPANY, DEFENDANTS

No. COA96-593

(Filed 5 August 1997)

1. Trusts and Trustees § 312 (NCI4th)— trustee’s breach of fiduciary duty—open, fair and honest dealings—submission of issue to jury

In an action by trust beneficiaries alleging breach of fiduciary duty, the trial court did not err in submitting to the jury issues as to whether defendant trustee acted in an “open, fair and honest” manner with regard to various transactions involving the trusts. The “open, fair and honest” defense is not an affirmative defense which must be specifically pleaded but is a rebuttal defense to the presumption of fraud, and defendant trustee presented sufficient evidence for this issue to be submitted to the jury.

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2. Accountants § 19 (NCI4th); Fraud, Deceit, and Misrepresentation § 5 (NCI4th)— failure to disclose tax assessment—breach of fiduciary duty—insufficient evidence

Plaintiff trust beneficiaries could not recover against defendant accountant and defendant accounting firm for breach of fiduciary duty in failing to promptly advise plaintiffs of a known impending tax assessment against the trusts where plaintiffs' evidence showed only that defendants may have willfully concealed the tax assessment but failed to prove the second element of constructive fraud by showing how this nondisclosure was tied to the consummation of any transaction.

3. Evidence and Witnesses § 21 (NCI4th)— Internal Revenue Code circular—failure to take judicial notice—absence of prejudice

Refusal of the trial court to judicially notice an Internal Revenue Code circular requiring an attorney or CPA with knowledge of noncompliance or error to promptly advise the client was not prejudicial error in plaintiff trust beneficiaries' action against a CPA for breach of fiduciary duty in failing to promptly notify them of an impending tax assessment against the trusts because the circular was not relevant to any issue before the court.

4. Trusts and Trustees § 191 (NCI4th)— attorney and trustee fees—absence of clerk's approval—judgment n.o.v.

The trial court erred by denying plaintiff trust beneficiaries' motions for judgment n.o.v. as to issues involving the amounts of attorney and co-trustee fees received by defendant from two trusts for which he did not receive approval by the clerk of court where the amounts of the fees and commissions were certain, not disputed, and easily calculable.

5. Trial § 563 (NCI4th)— amount of damages—denial of motion for new trial

The trial court did not err in the denial of a trust's motion for a new trial on the issue of damages for professional negligence by defendant attorney and defendant CPA in failing to file an IRS subchapter S corporation election form where the jury awarded the trust the amount of the tax assessment against it but did not award interest on loans used to pay the tax assessment.

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6. Costs § 10 (NCI4th)— expenses not allowed as costs—no abuse of discretion

The trial court did not abuse its discretion in failing to award plaintiffs costs for expenses incurred for expert witness fees, discovery, subpoenas, transcripts, reproducing documents for use as exhibits, and postage, since those expenses are not expressly allowed as costs by statute.

7. Accountants § 19 (NCI4th)— negligence in failing to file subchapter S election forms

The evidence supported the jury's verdict finding that defendant CPA and defendant accounting firm breached their duty of care to a corporation formed by plaintiff trust beneficiaries by failing to file, cause to be filed, or verify the filing of an IRS subchapter S election form with the result that the corporation was treated as a C corporation and required to pay additional taxes of \$272,848.

8. Principal and Agent § 17 (NCI4th)— CPA—agent of corporation—negligence not imputed to corporation through trustee-agent

Defendant CPA who prepared income tax returns and other documents for plaintiff trust beneficiaries' various trusts and corporations was an agent of one of the corporations, not a subagent of the trustee, where the CPA was hired by the trustee, who was acting as general business agent for the corporation; the accounting firm for which the CPA worked had done accounting work for the trusts since their inception; the CPA was paid by the corporation and did not work solely for the trustee; and there was no evidence that the trustee assumed responsibility for the CPA. Therefore, negligence by the CPA in failing to file subchapter S election forms or to ensure that such forms were filed was not imputed to the corporation through the trustee-agent so as to bar on the ground of contributory negligence its recovery against the CPA and the accounting firm for professional negligence.

9. Judgments § 650 (NCI4th)— prejudgment interest—award by jury—erroneous instruction—absence of prejudice

Defendants were not prejudiced by the trial court's erroneous instruction that the jury could award prejudgment interest on the principal amount of damages suffered by plaintiff corporation as a result of defendants' professional negligence where defend-

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ants did not object to this instruction and the jury did not award interest.

10. Judgments § 274 (NCI4th)— collateral estoppel—prior proceeding—issue not adjudicated

Plaintiff trust beneficiaries' claims to recover trustee commissions and attorney fees was not barred by collateral estoppel where the issue of disgorgement of trustee commissions and attorney fees had not been determined in a prior special proceeding in which plaintiffs unsuccessfully sought to have the trustee removed.

11. Trusts and Trustees §§ 190, 191 (NCI4th)— trustee commissions and attorney fees—clerk's approval not sought—failure to file annual accountings—breach of fiduciary duty—directed verdict

The trial court properly directed a verdict that defendant trustee's failure to obtain annual approval of the clerk for commissions and attorney fees and to file annual accountings constituted a breach of fiduciary duty as a matter of law where defendant trustee offered no evidence that he acted in an open, fair and honest manner, and the evidence supported the court's finding that no reasonable juror could find for defendant.

12. Attorneys at Law § 51 (NCI4th)— trustee commissions—constructive fraud—double damages

The trial court did not err in awarding double damages under N.C.G.S. § 84-13 in plaintiff trust beneficiaries' action against defendant trustee-attorney to recover commissions not approved by the clerk of court where the trial court found that defendant did not act openly, fairly, and honestly and thus committed constructive fraud.

13. Attorneys at Law § 45 (NCI4th)— trustee-attorney—breach of fiduciary duty—standard of care of specialist—instruction not required

In an action to recover for breach of fiduciary duty by defendant trustee-attorney, the trial court did not err by refusing to instruct the jury with respect to the higher standard of care applicable to one who holds himself out as a tax specialist as opposed to that applicable to a general practitioner where there was no evidence that the expertise of a tax specialist was required to perform services undertaken by defendant and no implication in tes-

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timony by plaintiffs' experts that defendant, a general practitioner, should be held to the standard of a tax specialist.

14. Damages § 85 (NCI4th)—constructive fraud—punitive damages

The trial court properly submitted the issue of punitive damages to the jury where plaintiffs proved at least nominal damages and there was evidence of constructive fraud by defendant.

Appeal by all parties from order entered 21 October 1995, appeal by defendants Sullivan and John C. Proctor & Co. from order entered 20 July 1995 and judgment entered 10 September 1995, and appeal by defendant Underwood from judgment entered 10 September 1995, all by Judge Melzer A. Morgan, Jr., in Pitt County Superior Court. Heard in the Court of Appeals 17 February 1997.

Bass, Bryant & Moore, by John Walter Bryant and William E. Moore, Jr., for plaintiffs.

Harris, Shields and Creech, P.A., by Mary V. Ringwalt and Robert S. Shields, Jr., for defendant Underwood.

Womble Carlyle Sandridge & Rice, by Christopher T. Graebe, for defendants Sullivan and John C. Proctor & Company.

MARTIN, John C., Judge.

Plaintiffs brought this action against defendant Underwood, an attorney, defendant John C. Proctor & Co., an accounting firm, and defendant Sullivan, a certified public accountant and employee of John C. Proctor & Co., alleging professional negligence and breach of fiduciary duty. Plaintiffs sought damages from all defendants and injunctive relief against defendant Underwood to compel him to render an accounting and provide access to trust documents. Plaintiffs also sought to remove defendant Underwood as co-trustee. Their motion for a preliminary injunction and their petition to remove Underwood as co-trustee were consolidated with a related special proceeding and were denied by the trial court. The trial court's denial of the petition to remove defendant Underwood as co-trustee was subsequently upheld by the North Carolina Supreme Court. *Smith v. Underwood*, 336 N.C. 306, 442 S.E.2d 322 (1994).

The case was tried before a jury at the 24 July 1995 civil session of the Superior Court of Pitt County. Briefly summarized to the extent

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necessary for an understanding of the issues raised by this appeal, evidence presented at trial tended to show that on 9 June 1954, W. H. Smith died testate in Pitt County. His Last Will and Testament created two trusts, one for the benefit of his wife, Ada T. Smith, and one for the benefit of his children and their descendants. Both trusts were to terminate at his wife's death. Defendant Underwood and Robert Lee Smith, W. H. Smith's oldest son, were appointed co-trustees of both trusts. Plaintiff James T. Smith was appointed successor co-trustee at Robert Lee Smith's death in 1989.

Underwood filed an initial trust accounting and received approval for attorney's fees and trustee's commissions in 1955. From 1956-1991, Underwood failed to file annual accountings and did not receive specific annual approval from the Clerk of Superior Court for attorney's fees and commissions which he charged the trusts.

In 1983, Underwood advised Mrs. Ada Smith to begin making annual gifts of her trust property in an amount less than \$10,000 to each of her children. Both trusts contained real property that had appreciated greatly in value since their formation. Plaintiffs faced a substantial inheritance and estate tax if Ada Smith died while owning this land. Underwood suggested to the heirs and Mrs. Smith that the Smith Heirs Corporation be formed so that land from the trusts could be conveyed into the corporation.

In the summer of 1985, Underwood called defendant Sullivan to discuss the possible formation of the proposed subchapter S corporation. Sullivan and John C. Proctor & Co. had done accounting for the trusts since their inception and had prepared tax filings for plaintiffs' various trusts, corporations, and personal returns throughout said time.

In December 1985, Underwood formed another corporation, Smith-S, Inc., which was to have been a subchapter S corporation pursuant to Internal Revenue Service ("IRS") regulations, so that this new corporation could receive and disperse trust property. Articles of incorporation were prepared and filed by Underwood, and the corporate minutes reflect that the directors and shareholders elected to be treated as a subchapter S corporation pursuant to IRS regulations. However, no IRS form 2553 (the required subchapter S election form) was ever submitted to the IRS.

In 1987, Underwood forwarded information to Sullivan for the preparation of the 1986 tax returns for the trusts and the two family

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corporations, and he reminded Sullivan that Smith-S, Inc., was “a subchapter S deal.” Sullivan asked for additional information. In response, Underwood prepared and delivered a handwritten sheet which contained the heading “Election,” indicating a date of election of 30 December 1985, as well as the date of incorporation and the names and social security numbers of all the shareholders. Sullivan relied on that information and never asked Underwood about the filing of form 2553, for the IRS’ confirmation letter concerning subchapter S status, or whether the corporation had fulfilled the requirements for subchapter S treatment. Sullivan completed the 1986 tax return for Smith-S, Inc., on an 1120-S tax form and signed his name as preparer. He completed similar returns for Smith-S, Inc., in 1988, 1989, 1990, and 1991 for each preceding tax year, along with the tax returns for the two testamentary trusts and Smith Heirs Corporation.

In December 1988, Underwood sold a tract of land known as the “Tucker land,” formerly trust property, which was at that time owned by the two corporations and the Smith Heirs trust. The land was sold to Collice Moore for \$2,350,000.00, with the bulk of the proceeds being paid to Smith-S, Inc. Underwood received an attorney’s fee of \$72,650.00 for arranging the sale of the “Tucker land.”

In April 1990, the IRS sent a letter to Underwood informing him that Smith-S, Inc.’s, 1988 tax return would be processed as a C corporation return since no form 2553 had ever been filed with the IRS. Underwood and Sullivan did not advise their clients of this problem; rather, they corresponded with each other and the IRS in an attempt to avoid the assessment. Plaintiffs were first informed of the problem in May 1991 when James T. Smith received a letter from the IRS that Smith-S, Inc., owed back taxes and penalties. Due to the failure to file form 2553, additional taxes in the amount of \$272,848.47, including penalties and interest, were ultimately assessed against Smith-S, Inc. Plaintiffs’ effort to challenge the tax assessment was unsuccessful.

The trial court directed a verdict in favor of plaintiffs and against defendant Underwood on plaintiffs’ claim for breach of fiduciary duty based upon Underwood’s admitted failure to obtain approval of commissions and attorney’s fees and failure to file annual accountings. The trial court also directed a verdict in favor of all defendants with regard to plaintiffs’ claim for breach of fiduciary duty based upon defendants’ failure to promptly disclose the impending IRS tax assessment for over six months. Finally, the trial court directed a verdict in favor of defendants Sullivan and John C. Proctor & Co. as to

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all claims for breach of fiduciary duty. Issues were submitted to the jury concerning defendants' professional negligence, damages, the amounts of attorney's fees and co-trustee's fees received by defendant Underwood for which he had not received approval, punitive damages, and whether certain of defendant Underwood's transactions with plaintiffs were "open, fair and honest" and took "no advantage of plaintiffs-trust beneficiaries."

The jury returned a verdict finding that plaintiff Smith-S, Inc., had been damaged by the professional negligence of both Underwood and Sullivan in failing to file form 2553, and awarding damages to Smith-S, Inc., in the amount of \$272,848.47. In addition, the jury found that defendant Underwood had received unapproved co-trustee commissions in the amount of \$13,073.30 for the W. H. Smith Trust and \$5,933.38 for the Ada T. Smith Trust, and unapproved attorney's fees in the amount of \$1 for each trust. The jury determined that defendant Underwood had acted in an open, fair, and honest manner and had taken no advantage of plaintiffs with regard to the following transactions: (1) commingling of trust and corporate funds; (2) sale of the "Tucker" land to Collice Moore; (3) refusal to cooperate with his co-trustee; (4) refusal to provide documents or information to beneficiaries; (5) miscalculation of commissions; and (6) receipt of an attorney's fee of \$72,650.00 in the sale of the "Tucker" land; but that he had not acted in an open, fair and honest manner in failing to file and obtain approval of annual trust accountings. However, the jury determined that plaintiffs were not entitled to recover any compensatory damages for this failure. Punitive damages in the amount of \$37.00 were awarded for Underwood's failure to obtain approval of commissions and in the amount of \$37.00 for his failure to file and obtain approval of trust accountings.

After judgment was entered, all parties moved for judgment notwithstanding the verdict; defendant Underwood and plaintiffs moved for a new trial; and plaintiffs moved for relief from the judgment. All post-trial motions were denied and all parties appeal.

Plaintiff-Appellants' Appeal

[1] Plaintiffs first contend that the trial court erred in submitting to the jury issues as to whether defendant Underwood's various dealings as co-trustee were "open, fair and honest." First, plaintiffs argue that defendant Underwood did not sufficiently plead any affirmative "open, fair and honest" defense to their claim for breach of fiduciary

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duty. Second, they contend that even if the defense was properly raised, defendant Underwood failed to offer sufficient evidence of the affirmative defense to carry his burden of proof on the issue.

For a fiduciary duty to exist there must first be a fiduciary relationship, which is a relationship in which “there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.” *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984) (quoting *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971)). Once a plaintiff establishes a *prima facie* case of the existence of a fiduciary duty, and its breach, the burden shifts to the defendant to prove he acted in an “open, fair and honest” manner, so that no breach of fiduciary duty occurred. *Hajmm Co. v. House of Raeford Farms*, 94 N.C. App. 1, 12, 379 S.E.2d 868, 874 (1989), *affirmed in part and reversed in part on other grounds*, 328 N.C. 578, 403 S.E.2d 483 (1991).

The “open, fair and honest” defense is not an affirmative defense to constructive fraud; it merely rebuts the presumption of fraud. In *Watts v. Cumberland County Hospital System, Inc.*, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986), our Supreme Court explained how transactions involving parties in a fiduciary relationship can create a rebuttable presumption of fraud:

When a fiduciary relationship exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible benefit. “This presumption arises not so much because [the fiduciary] has committed a fraud, but [because] he may have done so.” The superior party may **rebut** the **presumption** by showing, for example, “that the confidence reposed in him was not abused, but that the other party acted on independent advice.” Once rebutted, the presumption evaporates, and the accusing party must shoulder the burden of producing actual evidence of fraud (citations omitted) (emphasis added).

Thus, the “open, fair and honest” defense is a rebuttal defense to the presumption of fraud. *Id.* A rebuttal defense is not an affirmative defense. See *Adams-Arapahoe Joint School District No. 28-J v. Continental Insurance Co.*, 891 F.2d 772 (10th Cir. 1989) (instruction on affirmative defense erroneous since defense was offered as a rebuttal argument). Since it is not an avoidance or an affirmative defense, it need not be specifically pleaded in the answer. A

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denial is all that is required. N.C. Gen. Stat. § 1A-1, Rule 8(b) and (c) (1990).

Here, plaintiffs presented evidence that defendant Underwood, as co-trustee, owed them a fiduciary duty and that he engaged in certain transactions involving the trusts, including paying himself commissions and fees; the burden then shifted to defendant Underwood to prove he acted in an open, fair and honest manner. There was sufficient evidence in the record for a jury to reasonably determine that, in his dealings with the trusts, defendant Underwood acted in an open, fair and honest manner. Defendant Underwood provided the trust beneficiaries with yearly written statements of the expenses and income of each trust. While under his management, the value of the trusts grew significantly. Defendant offered evidence of his negotiation and approval of the sale of the "Tucker land." The submission of the issue of whether defendant Underwood dealt openly, fairly and honestly and took no advantage of the trust beneficiaries with regard to the various transactions alleged by plaintiffs was proper.

[2] Plaintiffs next contend the trial court erred in directing a verdict in favor of all defendants on the issue of their breach of fiduciary duty in failing to "promptly advise" plaintiffs of a known impending tax assessment. Plaintiffs also assert that the trial court erred in not taking judicial notice of Internal Revenue Code Circular 230 § 10.21, requiring an attorney or certified public accountant with knowledge of a client's noncompliance or error to promptly advise the client.

The elements of a constructive fraud claim are proof of circumstances "(1) which created the relation of trust and confidence, and (2) led up to and surrounded **the consummation of the transaction** in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981), (*quoting Rhodes v. Jones*, 232 N.C. 547, 61 S.E.2d 725 (1950)) (emphasis added).

[3] Although plaintiffs have adequately alleged the circumstances surrounding the formation and development of the alleged confidential relationship between plaintiffs and defendants Sullivan and John C. Proctor & Co., they have failed to identify the specific transactions alleged to have been procured by means of constructive fraud. While defendants may have willfully concealed the pending tax assessment, plaintiffs have failed in their proof of the second element of constructive fraud, specifically how this nondisclosure was tied to the consummation of any transaction. Accordingly, the directed verdict

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in favor of defendants Sullivan and John C. Proctor & Co. on the issue of breach of fiduciary duty was properly granted. Furthermore, the refusal of the court to judicially notice the Treasury Department circular was not prejudicial, as the circular was not relevant to any issue before the court, because plaintiffs failed in their offer of proof of how the nondisclosure was connected to the consummation of any transaction. N.C. Gen. Stat. § 8C-1, Rule 401 (1992).

[4] Plaintiffs next contend the trial court erred in denying their motions for judgment notwithstanding the verdict as to issues involving the amounts of attorney's fees and co-trustee's fees received by defendant Underwood from the two trusts for which he had not received approval from the Clerk of Superior Court. Plaintiffs argue that the attorney's and co-trustee's fees were certain, calculable sums which were not in dispute, and submission of the question to the jury was not required.

There was no dispute as to the amount of attorney's fees and commissions received by Underwood. Defendant Underwood's exhibits reveal that he charged \$3,277.00 in unapproved attorney's fees from the W. H. Smith trust for the years 1956-1991, and \$1,250.00 in unapproved attorney's fees from the Ada T. Smith trust for the same years. The exhibits also reveal that he received \$26,146.60 in unapproved commissions from the W. H. Smith trust, and \$11,866.52 in unapproved commissions from the Ada T. Smith trust for the same years. "Ordinarily, it is not permissible to direct a verdict in favor of a litigant on whom rests the burden of proof. When facts are judicially admitted and are no longer a subject of inquiry, then it is not only permissible, but it is the duty of the judge to answer the issue." *Smith v. Burleson*, 9 N.C. App. 611, 612, 177 S.E.2d 451, 452 (1970). The amounts of the attorney's fees and commissions were certain, were not disputed, and were easily calculable. Accordingly, the trial court erred in denying plaintiffs' motions for judgment notwithstanding the verdict, and the case must be remanded to the superior court for entry of directed verdict in favor of plaintiff trustee in the amounts of \$1,250.00 in unapproved attorney's fees and \$11,866.52 in unapproved commissions for the Ada T. Smith Trust, and \$3,277.00 in unapproved attorney's fees and \$26,146.60 in unapproved commissions for the W. H. Smith Trust, and for entry of judgment for double damages pursuant to G.S. § 84-13.

[5] Plaintiffs next assign as error the trial court's denial of its motion for a new trial on the issue of damages for professional negligence.

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Plaintiff claims that the damages awarded to it were grossly inadequate. Plaintiff offered evidence that it had to borrow hundreds of thousands of dollars to pay the tax penalty, but that the jury failed to compensate it for interest paid on these loans.

“A motion for a new trial on the grounds of inadequate damages is addressed to the sound discretion of the trial court” *Pelzer v. United Parcel Service*, 126 N.C. App 305, 484 S.E.2d 849, 853 (1997). Reversal on “any ground” should be limited to “those exceptional cases where an abuse of discretion is clearly shown.” *Worthington v. Bynum*, 305 N.C. 478, 484, 290 S.E.2d 599, 603 (1982). “[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge’s ruling probably amounted to a substantial miscarriage of justice.” *Id.* at 487, 290 S.E.2d at 605.

The jury awarded plaintiff the amount of the tax assessment. The amount awarded does not appear to be so inadequate as to indicate that the jury was “actuated by bias or prejudice, or that the verdict was a compromise. . . .” *Robertson v. Stanley*, 285 N.C. 561, 569, 206 S.E.2d 190, 195-96 (1974). The cold record in this case does not reveal a substantial miscarriage of justice sufficient to overturn the trial court’s ruling. *Roberts v. First-Citizens Bank and Trust Co.*, 124 N.C. App. 713, 478 S.E.2d 809 (1996); *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605. Plaintiffs’ motion for a new trial was properly denied.

[6] Finally, plaintiffs assign error to the denial of their motion for costs. Plaintiffs presented to the court a post-trial petition for costs in which they sought \$36,176.78 to be taxed as costs, including expenses for three expert witnesses’ fees, discovery, subpoena charges, transcript costs, the cost of reproducing documents for use at trial as exhibits, and miscellaneous postage charges. The court awarded costs in the amount of \$14,234.38. Plaintiffs contend the trial court abused its discretion.

In North Carolina costs are taxed on the basis of statutory authority. N.C. Gen. Stat. § 6-20 (1986). G.S. § 7A-305 sets forth certain costs which may be assessed in a civil action. Deposition expenses are allowed. *Sealey v. Grine*, 115 N.C. App. 343, 444 S.E.2d 632 (1994). In addition, costs which are not allowed as a matter of course under G.S. § 6-18 or § 6-19, such as in actions for the recovery of real property or personalty, may be allowed in the discretion of the court under G.S. § 6-20, which discretion is not reviewable on appeal.

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Minton v. Lowe's Food Stores, 121 N.C. App. 675, 468 S.E.2d 513, *disc. review denied*, 344 N.C. 438, 476 S.E.2d 119 (1996). Since the enumerated costs sought by plaintiffs are not expressly provided for by law, it was within the discretion of the trial court whether to award them. Plaintiffs have not shown an abuse of discretion.

Defendant-Appellants' James Sullivan and
John C. Proctor & Co.'s Appeal

[7] Defendants Sullivan and John C. Proctor & Co. first contend the trial court erred in denying their motions for directed verdict and judgment notwithstanding the verdict as to the claim of Smith-S, Inc., for professional negligence.

A directed verdict should be granted only if the trial judge could properly conclude that no reasonable juror could find for plaintiffs. *Hajmm Co.*, *supra*. All conflicts in the evidence must be resolved in favor of plaintiffs and the evidence must be viewed in a light most favorable to plaintiffs. *Id.* The standard of review is the same for a motion for judgment notwithstanding the verdict. *See Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E.2d 333 (1985). When determining the correctness of a trial court's denial of a motion for directed verdict or judgment notwithstanding the verdict, the question is "whether there is sufficient evidence to sustain a jury verdict in the non-moving party's favor . . . or to present a question for the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991) (citations omitted).

In this case, Sullivan acknowledged that he owed Smith-S, Inc., a duty of care. Smith-S, Inc., offered evidence that Sullivan did not file form 2553, nor did he ask Underwood whether form 2553 had been filed. In addition, he did not confirm with the IRS that Smith-S, Inc., had fulfilled all the requirements for subchapter S status. It is generally recognized that an accountant may be held liable for damages naturally and proximately resulting from his failure to use that degree of knowledge, skill and judgment usually possessed by members of the profession in a particular locality. *Snipes v. Jackson*, 69 N.C. App. 64, 316 S.E.2d 657 (1984) (*citing* 1 Am.Jur.2d, Accountants § 15 (1962)). Sullivan was hired to serve as plaintiffs' accountant; he was required to exercise the requisite professional responsibility that goes along with such a position. By not filing, causing to be filed, or verifying the filing of form 2553, Smith-S, Inc., was treated as a C corporation and forced to pay \$272,848.47 to the IRS in back taxes and penalties. Because there was sufficient evidence for reasonable

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jurors to find that defendant Sullivan breached the duty of care owed to Smith-S, Inc., defendants' motions were properly denied.

[8] Defendants Sullivan and John C. Proctor & Co. next contend that the trial court erred in denying their motion for directed verdict based on the contributory negligence of Smith-S, Inc., and in allowing its motion for directed verdict on the issue. They argue that Sullivan was not an agent of Smith-S, Inc., but a subagent of Underwood. Thus, even if Sullivan was professionally negligent, Underwood, as agent for Smith-S, Inc., also was negligent, and this negligence is imputed to plaintiff Smith-S, Inc., so as to constitute contributory negligence. The record reflects that the court stated: "with regard to the plaintiffs' motion for directed verdict on the Defendant Sullivan's claim—defense of contributory negligence, based on imputed contributory negligence, that motion is granted." The task of the trial court in considering a motion for directed verdict is to determine whether the evidence, viewed in the light most favorable to the non-movant, is sufficient to submit the case to the jury. *Clark v. Perry*, 114 N.C. App. 297, 442 S.E.2d 57 (1994).

A principal agent relationship exists when (1) the agent has authority to act for the principal and (2) the principal has control over the agent. *Colony Associates v. Fred L. Clapp & Co.*, 60 N.C. App. 634, 300 S.E.2d 37 (1983). In an action by a principal against an agent, the agent cannot impute his own negligence to the principal. *Rollison v. Hicks*, 233 N.C. 99, 63 S.E.2d 190 (1951). See also 53 A.L.R.3d 673-74 (1973). Where the negligence of two agents concurs to cause injury to the principal, the agents cannot impute the negligence of the fellow agent to bar recovery. *Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 363 S.E.2d 367, *disc. review denied*, 321 N.C. 744, 366 S.E.2d 862 (1988). However, if either defendant is found to be an independent contractor, that defendant would not be barred from imputing the agent's negligence to plaintiff. *Id.* Also, if one defendant is the subagent of another defendant-agent, then the defendant-agent is responsible to the principal for the conduct of the subagent. *Colony Associates, supra*. A subagent is "a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible." Restatement (Second) of Agency § 5(1) (1957). If the agent hires the subagent to carry out the principal's request, the subagent is the agent of the agent only. If the principal directs, either expressly or impliedly, the agent to hire the subagent, the subagent becomes the agent of the principal.

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Colony Associates, supra. With these rules in mind, the question is whether Sullivan is an agent for plaintiffs, an independent contractor for plaintiffs, or a subagent of agent Underwood.

In this case, Sullivan was hired by Underwood, who was acting as the general business agent for Smith-S, Inc. Sullivan had worked for Proctor & Co. since about 1962, and Proctor & Co. had done accounting work for plaintiffs' trusts since their inception at W. H. Smith's death in 1954. Sullivan and Proctor & Co. prepared the K1 forms for the trusts and corporations. Sullivan has prepared and signed income tax returns for plaintiffs' various trusts and corporations and has performed work for, and been paid by, the principals; he has not worked solely for Underwood. There is no evidence that Underwood assumed responsibility for Sullivan. Thus, the relationship between Sullivan and Smith-S, Inc., was that of principal-agent.

Because there was a principal-agent relationship between Smith-S, Inc., and Sullivan, Sullivan had the burden of proving that Underwood, and not Sullivan, was negligent in order to impute such negligence to Smith-S, Inc., and bar its recovery. *See Stacy v. Jedco Construction, Inc.*, 119 N.C. App. 115, 457 S.E.2d 875, *disc. review denied*, 341 N.C. 421, 461 S.E.2d 761 (1995). In reviewing defendant-appellants Sullivan and Proctor & Co.'s motion for a directed verdict in the light most favorable to Smith-S, Inc., there was sufficient evidence of defendant-appellants' negligence to present a question for the jury. First, there was sufficient evidence to conclude that Sullivan and Proctor & Co. owed a duty to the corporation to file form 2553, or to ensure that it had been filed. There was evidence of an accountant-client relationship with plaintiffs dating back to 1954, that they were counted on to be the tax accountant, and that Smith-S, Inc., was the client of Sullivan and Proctor & Co. at the time when form 2553 should have been filed. There was also expert testimony presented at trial that defendants Sullivan and Proctor & Co. breached the applicable standard of care in failing to follow through to ensure that form 2553 had been filed. Defendant Underwood also testified that he relied on defendant Sullivan to handle all matters with the IRS relating to the formation of Smith-S, Inc. Thus, reasonable jurors could conclude that defendants Sullivan and Proctor & Co. were professionally negligent, and the court properly denied their motion for a directed verdict as to imputed contributory negligence.

[9] Finally, defendants Sullivan and Proctor & Co. contend the trial court erred in awarding statutory prejudgment interest to Smith-S,

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Inc. They argue that the court's instructions permitted the jury to consider interest and that no additional interest should have been added to the jury award.

North Carolina law expressly provides that interest is added automatically from the date of the filing of the complaint:

In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied.

N.C. Gen. Stat. § 24-5(b) (1991).

In this case, the trial court instructed as follows:

Any amount you allow as future damages must be reduced to its present value because a smaller sum now is equal to a larger sum received in the future. Simply, any principle [sic] amounts which you find that Smith S, Inc., had to pay before now due to the negligence of either or both of the defendants or of another employee of John C. Proctor and Company which Smith S, Inc., did not borrow, may be augmented by interest on that principle [sic] sum to date. You may take into account expert testimony received on the issue of total damages.

Thus, the jury was instructed that in considering damages, it could award prejudgment interest on the principal damages suffered by Smith-S, Inc. The instruction was error; however, we decline to disturb the judgment for two reasons. First, defendant did not object to the instruction as required by N.C.R. App. P. 10(b)(2), and second, the jury awarded no interest, as is apparent from the fact that the damage award was identical to the IRS assessment. This assignment of error is overruled.

Defendant-Appellant Underwood's Appeal

[10] In his first assignment of error defendant Underwood contends the trial court erred in denying his motion for a directed verdict dismissing plaintiffs' claims to recover trustee commissions and attorney's fees since this claim was barred by the doctrine of collateral estoppel. Defendant claims that the issues of trustee commissions and attorney's fees were fully litigated in the earlier special proceeding to remove him as co-trustee.

Collateral estoppel applies when the following requirements are met:

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(1) The issues to be concluded must be the same as those involved in the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Beckwith v. Llewellyn, 326 N.C. 569, 574, 391 S.E.2d 189, 191, *reh'g denied*, 327 N.C. 146, 394 S.E.2d 168 (1990) (*quoting King v. Grindstaff*, 284 N.C. 348, 200 S.E.2d 799 (1973)).

The issue in the special proceeding was whether Underwood should be removed as co-trustee. Plaintiffs' prayer for relief was repayment of trustee commissions and attorney's fees. The pertinent issue that was litigated in the present action was whether defendant Underwood breached his fiduciary duty. The prayer for relief also included repayment of trustee commissions and attorney's fees.

While the relief requested in both the petition in the special proceeding and the complaint in the present action included disgorgement of trustee commissions and attorney's fees, the issue was not decided in the special proceeding. Disgorgement is granted in a removal proceeding only if the trustee is removed. *See* N.C. Gen. Stat. § 32-50(j) (1996). The issues of cause for removal of a trustee and breach of fiduciary duty in a damage action require different proof. Since removal did not occur in the special proceeding, the issue of disgorgement was not necessary to the judgment in that proceeding and was not decided. *See Beckwith, supra*. Accordingly, the claim was not barred by the doctrine of collateral estoppel. The motion for directed verdict as to plaintiffs' claim for trustee commissions and attorney's fees was properly denied.

[11] Defendant Underwood next contends the trial court erred in directing a verdict that defendant's failure to (1) obtain annual approval of the Clerk for commissions, (2) obtain annual approval of the Clerk for attorney's fees, and (3) file formal annual accountings constituted a breach of fiduciary duty as a matter of law. Defendant argues that these issues were for the jury.

Once a plaintiff establishes a *prima facie* case of breach of fiduciary duty, the burden shifts to the defendant to show he acted in an open, fair and honest manner. *Hajmm Co., supra*. Defendant

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Underwood had a statutory duty to obtain annual approval of the clerk for his attorney's fees and commissions, and to file an annual accounting. N.C. Gen. Stat. §§ 32-50, 32-51 (1996) and N.C. Gen. Stat. § 36A-107 (1995). Underwood breached this duty, yet he offered no evidence to meet his burden of proving that he acted in an open, fair or honest manner in these transactions. The record reflects that Judge Herring *ex mero motu* ordered Underwood to file an accounting within 120 days of the January 1992 hearing, and defendant failed to do so; that defendant Underwood excluded his co-trustee from management of the trust; that he commingled corporate matters with trust matters; and in failing to make the required reports and obtain the required approvals, that defendant Underwood concealed records and information from the beneficiaries. Accordingly, any improper dealing or damages therefrom would have been nearly impossible to detect. Moreover, the mere fact that the trust made money is not sufficient to prove that defendant Underwood acted "openly, fairly and honestly." The court appropriately found that no reasonable juror could find for defendant.

[12] By his next assignment of error defendant Underwood contends that the trial court erred in doubling the commissions awarded by the jury pursuant to G.S. § 84-13.

G.S. § 84-13 provides, "[i]f any attorney commits any fraudulent practice, he shall be liable in an action to the party injured, and on the verdict passing against him, judgment shall be given for the plaintiff to recover double damages." This Court has previously held that this statute applies in cases of actual and constructive fraud. *Booher v. Frue*, 98 N.C. App. 570, 394 S.E.2d 816, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674 (1990). As co-trustee of plaintiffs' trusts, defendant Underwood had a fiduciary relationship to plaintiffs; the jury found that in the performance of his obligation to file annual accountings, defendant Underwood did not act openly, fairly and honestly, which is tantamount to constructive fraud. *Id.* Thus, the trial court did not err in awarding double damages. N.C. Gen. Stat. § 84-13 (1995).

[13] By his next assignment of error defendant Underwood contends the trial court erred by failing to instruct the jury with respect to the higher standard of care applicable to one who holds himself out as a specialist as opposed to that applicable to a general practitioner. Specifically, defendant Underwood's written request for instructions included the following request: "N.C.P.I 808.10 Medical

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Malpractice—Duty to Patient—Specialists (modified for Attorney).” Assuming *arguendo* that the request complied with the requirements of G.S. § 1-181 and G.S. § 1A-1, Rule 51(b), the court’s refusal to give the request was not error. There was no evidence that the expertise of a tax specialist was required to perform the services undertaken by defendant Underwood and, contrary to defendant Underwood’s argument, there was no implication in the testimony of plaintiffs’ expert legal witnesses that defendant Underwood, as a general practitioner, should be held to the standard of a tax specialist. Accordingly, this assignment of error is overruled.

[14] By his next assignment of error defendant Underwood contends the trial court erred in submitting the issue of punitive damages to the jury. However, punitive damages are allowed where a plaintiff has proven at least nominal damages and where an element of aggravation, such as fraud, causes the injury. So long as there is “some fact or circumstance” in evidence from which fraud or another element of aggravation can be inferred, the question of punitive damages is for the jury and not for the court. *Ingle v. Allen*, 69 N.C. App. 192, 198, 317 S.E.2d 1, 4, *disc. review denied*, 311 N.C. 757, 321 S.E.2d 135 (1984) (citations omitted).

By his final assignment of error defendant Underwood contends the trial court erred in denying his motion for judgment notwithstanding the verdict and a new trial. Specifically, defendant argues that a directed verdict should not have been granted on the constructive fraud claim and, because of this error, defendant was prejudiced on the professional negligence claim. We have already found that the directed verdict was properly granted.

The issues of professional negligence and constructive fraud were completely distinct. One involved the failure of the defendants to file a form 2553 and secure S-corporation status for Smith-S, Inc. The other issue involved the failure to obtain approval of attorney’s fees and commissions, and to file annual accountings. Nothing in the record indicates any juror confusion between the two issues. The mere fact that the jury verdict on the professional negligence claim was adverse to defendant Underwood is not sufficient to show that the court’s directed verdict on the issue of constructive fraud must have been prejudicial. Accordingly, defendant Underwood’s motion for judgment notwithstanding the verdict and new trial was properly denied.

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Plaintiff's Appeal—No error in part, remanded in part.

Appeal of defendants Sullivan and John C. Proctor & Co.—No error.

Appeal of defendant Underwood—No error.

Chief Judge ARNOLD and Judge WALKER concur.



EDWARD LEE BARHAM, PLAINTIFF v. KELLI MOORE BARHAM, DEFENDANT

No. COA96-742

(Filed 5 August 1997)

1. Divorce and Separation § 392.1 (NCI4th)— child support guidelines—supporting spouse's income—funds encumbered by bank

The trial court erred when calculating child support under the North Carolina Child Support Guidelines by failing to consider all of plaintiff's gross income in 1993 and 1994 rather than the net amount retained after a creditor bank encumbered a portion of plaintiff's corporation's cash reserves. Neither party challenged the finding that the Guidelines apply; under the Guidelines, the definition of gross income in the self-employment/business income context is gross receipts minus ordinary and necessary expenses required for self-employment or business operation. The encumbered cash reserve constitutes value retained by plaintiff; it is not like expenses for repairs, property management and leasing fees, real estate taxes, insurance and mortgage interest, all of which are spent money never to be regained by the spender. Although technically encumbered, the cash reserves are available to plaintiff under the Guidelines because it was his choice to pledge them to the bank in exchange for business financing.

2. Divorce and Separation § 275 (NCI4th)— alimony—gross income—amount pledged to bank as business reserve—excluded

The trial court erred in calculating plaintiff's gross income when reducing his alimony payments under N.C.G.S. §§ 50-16.5

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and 50-16.9 as they existed prior to 1 October 1995 by not including the portion of plaintiff's gross income pledged to a bank in a reserve. The critical issue in determining a supporting spouse's gross income is the supporting spouse's actual ability to make alimony payments. By deducting the cash reserves pledged to the bank by plaintiff's corporation from his annual gross income, the trial court in effect placed the burden of this voluntarily assumed business investment on defendant, the dependent spouse. Just as a supporting spouse is not required to pay for the maintenance and support of a dependent spouse's business ventures, a dependent spouse also should not be made to bear the financial burden of a supporting spouse's investment. Although plaintiff contends that any error in the calculation was not prejudicial because the court based its calculation of alimony solely on a change in defendant's needs and not on plaintiff's ability to pay, the court's findings and conclusions do not indicate whether the increase in defendant's income was the dispositive factor; in addition, no single factor under N.C.G.S. § 50-16.5(a) should be viewed in isolation in calculation of the proper amount of alimony.

3. Divorce and Alimony § 280 (NCI4th)— alimony—standard of living—modified to post-divorce level

The trial court erred when determining a change in alimony by modifying defendant's accustomed standard of living from that determined in the prior, 1990 order based on findings that defendant had not returned to the standard of living she enjoyed during the marriage and that plaintiff had only begun to approximate his previous standard of living after he remarried. Alimony is designed to enable the dependent spouse to achieve the standard of living she or he enjoyed during the marriage; here, the trial court unequivocally disregarded this principle and instead based alimony on the standard of living the parties maintained after the divorce.

4. Divorce and Alimony § 538 (NCI4th)— modification of alimony reversed—attorney fees denied—not reviewed—entitlement to relief sought

The issue of whether the court erred by denying defendant attorney fees was not addressed where modification of her alimony was reversed. Entitlement to the relief sought is necessary for an award of attorney's fees.

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**5. Divorce and Separation § 427 (NCI4th)— child support—
increase—effective date**

A trial court did not abuse its discretion by not increasing child support effective as of the date of the motion. Although the court has the discretion to modify a child support order as of the date of the petition to modify, it is not required to do so.

**6. Divorce and Alimony § 291 (NCI4th)— alimony—changed
circumstances—consumer price index—no automatic
update**

The trial court did not err by failing to apply the consumer price index to make cost of living adjustments when comparing defendant's reasonable alimony needs as determined in a 1990 order to her needs as of the effective date of this 1995 order. It has previously been observed that the general reliability of consumer price index statistics has not been established. The trial court made findings regarding defendant's reasonable expenses and needs as of the 1995 hearing. Defendant was required to carry her burden to show a change of circumstances and was not entitled to an automatic updating of her reasonable needs and expenses based on the consumer price index.

Judge WALKER concurring in part and dissenting in part.

Appeal by defendant and cross appeal by plaintiff from order entered 11 July 1995 and amended 28 September 1995 by Judge William C. Lawton in Wake County District Court. Heard in the Court of Appeals 19 March 1997.

Gulley, Kuhn & Taylor, L.L.P., by Jack P. Gulley, for plaintiff.

Oliver & Oliver, PLLC, by John M. Oliver and Cindy G. Oliver, for defendant.

McGEE, Judge.

Plaintiff and defendant were married in June 1968 and divorced in August 1988. Two children were born of the marriage. On 17 October 1990, the Wake County District Court ordered plaintiff to pay defendant permanent alimony of \$686 per month and child support of \$532 per month. In 1990, plaintiff owned one-half interest in Triangle Retirement Services, Inc. He drew \$4000 monthly income solely from this corporation, and defendant had a gross annual income of \$14,500.

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In the 1990 order, the court found defendant's reasonable needs, to maintain her accustomed standard of living, were in excess of \$2500 per month but that plaintiff was unable to pay enough alimony to enable her to achieve her accustomed standard of living.

In 1994, both plaintiff and defendant moved to modify the 1990 order and defendant moved for attorney's fees. The motions were heard during the 24 May 1995 Domestic Session of Wake County District Court, Judge William C. Lawton presiding. The trial court found, as of the hearing date, plaintiff's annual net income drawn from the corporation was \$62,000 (\$77,500 gross) based on an agreement with a creditor bank in which an encumbered portion of the corporation's cash reserves could not be paid out as salary. Defendant earned a gross income of \$2860 per month at the time of the hearing. By order entered 11 July 1995, the trial court decreased plaintiff's alimony obligation to \$532 per month and increased his child support obligation to \$699 per month and denied defendant's request for attorney's fees. On 28 September 1995 the trial court entered an order amending the 11 July 1995 order. Defendant appeals and plaintiff cross appeals from the 11 July 1995 order, as amended.

I. Defendant's Appeal

[1] Defendant first contends the trial court erroneously calculated child support and alimony by failing to consider all of plaintiff's gross annual income in 1993 and 1994. Specifically, she contends the court erred by computing plaintiff's gross annual income based on the amount actually retained by him from the corporation (\$62,000 net/\$77,500 gross) rather than on the gross annual income he reported on his 1993 federal income tax return and his estimated gross annual income for 1994.

A. Gross Income Calculation for Child Support

N.C. Gen. Stat. § 50-13.4(c) provides, in pertinent part:

(c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

G.S. § 50-13.4(c) (1995).

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The amount of a parent's child support obligation is determined by application of The North Carolina Child Support Guidelines (Guidelines). G.S. § 50-13.4(c); *Rose v. Rose*, 108 N.C. App. 90, 93, 422 S.E.2d 446, 447 (1992). A trial court may deviate from the Guidelines when it finds, by the greater weight of the evidence, application of the Guidelines: (1) would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support; or (2) would be otherwise unjust or inappropriate. G.S. § 50-13.4(c); *Guilford County ex rel. Easter v. Easter*, 344 N.C. 166, 169, 473 S.E.2d 6, 7-8 (1996). Here, the trial court found the Guidelines apply and neither party challenges that finding.

The Guidelines define "income" as "actual gross income of the parent, if employed to full capacity, or potential income if unemployed or underemployed." Guidelines, at 2 (1 October 1994). The Guidelines further describe "gross income" as follows, in pertinent part:

(1) Gross income: Gross income includes income from any source, except as excluded below, and includes but is not limited to income from salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security benefits, workers compensation benefits, unemployment insurance benefits, disability pay and insurance benefits, gifts, prizes and alimony or maintenance received from persons other than the parties to the instant action. . . .

(2) Income from self-employment or operation of a business: For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, gross income is defined as *gross receipts minus ordinary and necessary expenses required for self-employment or business operation*. Specifically excluded from ordinary and necessary expenses for purpose of these Guidelines are amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by the Court to be inappropriate for determining gross income for purposes of calculating child support. In general, income and expenses from self-employment or operation of a business should be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most

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cases, this amount will differ from a determination of business income for tax purposes.

Guidelines, at 2-3 (emphasis added).

In this case the trial court did not include in plaintiff's actual gross annual income an encumbered cash reserve owned by plaintiff's corporation. On this issue the court found:

27. While there is a sizeable cash reserve of Plaintiff's corporation (which would ordinarily be available to Plaintiff as an owner), this reserve is currently fully encumbered by a creditor bank of Plaintiff's corporation, and by contract cannot be used by Plaintiff or his current wife. It, therefore, is not considered by the Court as "income", though in the future, when the bank/creditor is out of the financial picture, this cash reserve fund of Plaintiff's closely held corporation may, indeed, be income. The current balance of this retained earnings account is now around \$100,000.00.

Similarly, the trial court made the following conclusion of law:

7. . . . While cash reserves are generally liquid and available to owners (a portion of which is generally counted on, however, for use in capital improvements) where the cash reserve is required to be deposited in and is held by a creditor/bank, it is not considerable as "income" available in computing alimony and/or support.

We find the trial court's exclusion of plaintiff's corporation's encumbered cash reserve funds in its calculation of child support prejudicial error. The definition of gross income in the self-employment/business income context is "gross receipts minus ordinary and necessary expenses required for self-employment or business operation." Guidelines, at 3. The critical question, then, is whether the cash reserves pledged to the bank by plaintiff's corporation constitute an ordinary and necessary expense under this definition.

This Court addressed a similar question in *Lawrence v. Tise*, 107 N.C. App. 140, 419 S.E.2d 176 (1992). In *Lawrence*, this Court held "[m]ortgage principal payments . . . are not an 'ordinary and necessary expense' within the meaning of the Guidelines." *Id.* at 149, 419 S.E.2d at 182. The Court listed the following types of expenses as those which are properly deducted as ordinary and necessary: "expenses for repairs, property management and leasing fees, real estate taxes, insurance and mortgage interest." *Id.* The encumbered cash reserve

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at issue here is more like the mortgage principal payments in *Lawrence* than the expenses held ordinary and necessary in *Lawrence*. Like the mortgage principal payments and unlike the other expenditures, the encumbered cash reserve constitutes value retained by plaintiff. It is not like expenses for repairs, property management and leasing fees, real estate taxes, insurance and mortgage interest all of which are spent money never to be regained by the spender. Although technically encumbered, the cash reserves are available to plaintiff under the Guidelines because it was his choice to pledge them to the bank in exchange for business financing. Since the court erred in calculating plaintiff's gross annual income under the Guidelines, we reverse this portion of the court's order and remand for a re-calculation of child support under the Guidelines.

B. Gross Income Calculation for Alimony

[2] We also find prejudicial error in the trial court's calculation of gross annual income in regard to its decision to reduce plaintiff's alimony payments.

The two alimony statutes applicable here, N.C. Gen. Stat. §§ 50-16.5 and 50-16.9 were repealed and amended, respectively, on 1 October 1995. *See* 1995 Sess. Laws ch. 319, §§ 1, 7. These changes are applicable only to actions filed on or after 1 October 1995 and do not apply to pending litigation, or to future motions in the cause seeking to modify orders or judgments in effect on 1 October 1995. 1995 Sess. Laws ch. 319, § 12. Since the order the parties seek to modify in this action was entered prior to 1 October 1995, *i.e.* 17 October 1990, the statutes as they existed prior to 1 October 1995 apply here.

G.S. § 50-16.9 provided in pertinent part: "An order of a court of this State for alimony . . . may be modified . . . at any time, upon motion in the cause and a showing of changed circumstances." *See* G.S. § 50-16.9(a) (1995) (Editor's Note). In general, the change of circumstances required for modification of an alimony order "must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay." *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982). The G.S. § 50-16.5 factors used in making the initial alimony award should be used by the trial court when hearing a motion for modification. *Rowe*, 305 N.C. at 187, 287 S.E.2d at 846. The version of G.S. § 50-16.5 applicable here provided: "(a) Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the

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particular case.” See G.S. § 50-16.5(a) (1995) (Editor’s Note). “[T]he ‘overriding principle’ in cases determining the correctness of alimony is ‘fairness to all parties.’ ” *Fink v. Fink*, 120 N.C. App. 412, 418, 462 S.E.2d 844, 850 (1995) (quoting *Marks v. Marks*, 316 N.C. 447, 460, 342 S.E.2d 859, 867 (1986)), *disc. review denied*, 342 N.C. 654, 467 S.E.2d 710 (1996).

Defendant contends the trial court miscalculated plaintiff’s actual gross annual income: (1) when it failed to utilize the gross annual income he reported in his federal income tax returns; and (2) when it did not count the cash reserves pledged to the bank by plaintiff’s corporation as part of plaintiff’s gross annual income.

Although the amount of income reported for tax purposes is relevant evidence, this amount is not necessarily equivalent to annual gross income for alimony purposes. See *Britt v. Britt*, 49 N.C. App. 463, 471, 271 S.E.2d 921, 927 (1980). In *Britt*, this Court stressed the differences between actual income and taxable income stating: “[b]ecause plaintiff’s business expenses, including depreciation on his equipment, as well as his alimony payments, are deductible from his total income in determining his adjusted gross income . . . that figure is not appropriate for determining his *actual ability* to meet his alimony payments.” *Id.* (Emphasis added).

In determining a supporting spouse’s gross income, the critical issue is the supporting spouse’s actual ability to make alimony payments. See *id.* In assessing plaintiff’s ability to pay alimony, we apply the principle that “[p]ayment of alimony may not be avoided merely because . . . [a supporting spouse] has remarried and voluntarily assumed additional obligations.” *Britt*, 49 N.C. App. at 473, 271 S.E.2d at 928 (quoting *Sayland v. Sayland*, 267 N.C. 378, 383, 148 S.E.2d 218, 222 (1966)). In addition, the rationale employed by this Court in reviewing a trial court’s assessment of a dependent spouse’s needs in *Beaman v. Beaman*, 77 N.C. App. 717, 336 S.E.2d 129 (1985) fairly applies in this context as well. In *Beaman*, this Court held a trial court erred in its alimony calculation by failing to determine the extent to which a dependent spouse’s business and personal expenses were duplicative. *Id.* at 724, 336 S.E.2d at 133. The Court stated: “ ‘Alimony’ means payment for the support and maintenance of a spouse. . . .’ It does not mean payment for the support and maintenance of a spouse’s business ventures.” *Id.*

By deducting the cash reserves pledged to the bank by plaintiff’s corporation from his annual gross income the trial court, in effect,

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placed the burden of this voluntarily assumed business investment on defendant, the dependent spouse. Just as a supporting spouse is not required to pay for the maintenance and support of a dependent spouse's business ventures, a dependent spouse also should not be made to bear the financial burden of a supporting spouse's business investment. The trial court erred by excluding the cash reserves pledged to the bank by plaintiff's corporation from plaintiff's annual gross income.

Plaintiff contends any error in this calculation was not prejudicial to defendant because the trial court based its calculation of alimony solely on a change in defendant's needs and not on plaintiff's ability to pay. We disagree. The trial court's findings of fact and conclusions of law do not indicate whether the increase in defendant's income was the dispositive factor justifying the reduction of alimony. In addition, no single factor under G.S. § 50-16.5(a) should be viewed in isolation in calculation of the proper amount of alimony as this statute requires the trial court to assess all of the enumerated factors along with "other facts of the particular case." G.S. § 50-16.5(a). Similarly, in *Britt*, this Court held a determination of changed circumstances, based solely on the parties' incomes, was error because calculation of alimony requires a trial court to compare "[t]he present overall circumstances of the parties" with "the circumstances existing at the time of the original award." *Britt*, 49 N.C. App. at 474, 271 S.E.2d at 928. The trial court erred in calculating plaintiff's annual gross income. On remand, the court should evaluate the parties' motions for modification of alimony in light of a proper assessment of plaintiff's annual gross income.

[3] Defendant next contends the trial court erred by modifying her accustomed standard of living from that determined in the 1990 order. We agree.

The court made the following pertinent findings and conclusions in the 1995 order:

FINDINGS OF FACT

9. . . . Defendant remains a dependant spouse and Plaintiff remains a supporting spouse, *for purposes of maintaining Defendant's current accustomed standard of living.*

10. Now some five years after the prior Court Order, *it is difficult, if not impossible to artificially now maintain the fictional "accustomed standard of living" that existed on June 5, 1987;*

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so much has changed in the parties lives and their worlds in the ensuing 8 years. The Court needs now to concern itself with essentially the currently expected standard of living of Defendant and the parties' child, considering those same factors as were considered by the previous Court and are mandated by statute and case law to be considered.

* * *

19. Defendant has not ever returned to the standard of living she enjoyed during the parties' marriage. Until his remarriage to his current wife, Plaintiff did not enjoy a standard of living anywhere near that he enjoyed during the parties' marriage. . . .

* * *

24. Neither Plaintiff nor Defendant lived after separation at their married standard of living. Only when Plaintiff remarried did he begin to approximate his previous standard of living, due mainly to the income of his current wife. . . .

* * *

CONCLUSIONS OF LAW

* * *

2. Defendant is dependant on Plaintiff and remains in need of maintenance and support from Plaintiff to maintain a standard of living *for today* and based upon the estates, earnings, and conditions of the parties for today.

(Emphasis added).

The critical issue is whether a trial court may rely on the parties' accustomed standard of living evaluated as of the hearing date rather than on the accustomed standard of living during the marriage when deciding whether to modify the amount of alimony under G.S. § 50-16.9.

"Accustomed standard of living" is one of the factors under G.S. § 50-16.5 that must be considered by a court on a motion for modification of alimony based on changed circumstances. *See* G.S. § 50-16.5(a); *Rowe*, 305 N.C. at 187, 287 S.E.2d at 846. Our Supreme Court has defined the phrase "accustomed standard of living" used in G.S. § 16.5 as follows:

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The . . . phrase clearly means more than a level of mere economic survival. Plainly, in our view, it contemplates the economic standard established by the marital partnership for the family unit *during the years the marital contract was intact*. It anticipates that alimony, to the extent it can possibly do so, *shall sustain that standard of living for the dependent spouse to which the parties together became accustomed*.

Williams v. Williams, 299 N.C. 174, 181, 261 S.E.2d 849, 855 (1980) (emphasis added). As explained in *Williams*, alimony is designed to enable the dependent spouse to achieve the standard of living she or he enjoyed during the marriage. Here, the trial court unequivocally disregarded this principle and, instead, based alimony on the standard of living the parties maintained after the divorce. This approach was error prejudicial to defendant and requires remand for proper determination of the alimony amount in light of the accustomed standard of living of the parties during the marriage.

[4] Defendant next contends the trial court erred by denying her attorney's fees in regard to plaintiff's motion for a decrease in alimony and her motion for an increase in alimony. To obtain an award of attorney's fees in a proceeding seeking a modification of alimony, "the party seeking the fees must show: (1) that he or she is a dependent spouse; (2) that he or she is entitled to the relief demanded based upon all the evidence; and (3) that he or she has insufficient means to defray the expenses of the proceeding. *Cecil v. Cecil*, 74 N.C. App. 455, 459, 328 S.E.2d 899, 901 (1985). Since we have reversed and remanded the court's modification of alimony, it remains to be determined whether defendant is entitled to the relief she seeks on this issue. Since entitlement to the relief sought is necessary for an award of attorney's fees in this context, we decline to address the attorney's fees issue further.

[5] Defendant next contends the trial court erred by failing to make its increase in child support effective as of the date of her motion filed on 15 July 1994. We disagree. Although a trial court "has the discretion to modify a child support order as of the date the petition to modify is filed," *Mackins v. Mackins*, 114 N.C. App. 538, 546, 442 S.E.2d 352, 357, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 527 (1994), it is not required to do so. The trial court did not abuse its discretion by not making its order modifying child support effective as of the date of defendant's motion.

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[6] Finally, defendant contends the trial court erred by failing to apply the consumer price index to make proper cost of living adjustments when comparing her reasonable alimony needs as determined in the 1990 order to her reasonable needs as of the effective date of the 1995 order. We disagree.

In essence, defendant contends the trial court was required to evaluate the dollar amount of her reasonable needs as found in the 1990 order in a manner which reflects what this amount would be in 1995 dollars. She cites no cases which require such an updating of findings in a previous alimony order and we have found none. In fact, we have previously observed that the general reliability of consumer price index statistics has not been established. *Snipes v. Snipes*, 118 N.C. App. 189, 197, 454 S.E.2d 864, 869 (1995) (citing *Falls v. Falls*, 52 N.C. App. 203, 218-19, 278 S.E.2d 546, 556-57, *disc. review denied*, 304 N.C. 390, 285 S.E.2d 831 (1981)). Here, the trial court made findings regarding defendant's reasonable expenses and needs as of the 1995 hearing. In order to obtain an increase in alimony, defendant was required to carry her burden to show a change of circumstances pursuant to G.S. § 50-16.9. She was not entitled to an automatic updating of her reasonable needs and expenses based on the consumer price index. This assignment of error is without merit.

II. Plaintiff's Cross Appeal

In his brief, plaintiff has expressly abandoned his cross appeal and, therefore, we do not address the issue presented therein.

Reversed in part, affirmed in part, and remanded.

Judge GREENE concurs.

Judge WALKER concurs in part and dissents in part.

Judge WALKER concurring in part and dissenting in part.

I vote to affirm the trial court's order in its entirety. I respectfully dissent from the majority opinion which holds the trial court erred in concluding that plaintiff's gross income for the purpose of calculating his child support and alimony obligations did not include his corporation's cash reserve. I further dissent from the majority opinion which concludes the trial court erred in failing to properly determine the alimony "in light of the accustomed standard of living of the parties during the marriage."

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The Child Support Guidelines provide that

[i]n general, income and expenses from self-employment or operation of a business should be carefully reviewed to determine an appropriate level of gross income **available** to the parent to satisfy a child support obligation. **In most cases, this amount will differ from a determination of business income for tax purposes.**

Guidelines at 3 (emphasis added).

Here, the trial court found that although plaintiff's corporation maintained a sizeable cash reserve, this reserve was fully encumbered by the creditor bank and could not be used by plaintiff or his current wife. The trial court also noted that although the cash reserve was reported as income for Subchapter S tax purposes, the reserve would only become income available to plaintiff if the assets of the corporation were sold. Because the trial court should only consider funds actually and presently available to an obligor in calculating child support and alimony obligations, the trial court's conclusion that "where the cash reserve is required to be deposited in and is held by a creditor/bank, it is not considerable [sic] as 'income' available in computing alimony and/or support," should be affirmed.

In addition, the trial court did not abuse its discretion in reducing plaintiff's alimony obligation. The amount of alimony awarded by the trial court "is not reviewable on appeal in the absence of an abuse of discretion." *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982). While consideration must be given to the estates and earnings of both spouses, as well as the needs of the dependent spouse, the determination of the amount of alimony awarded " 'is a question of fairness and justice to all parties.' " *Id.* (quoting *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976)).

Here, the trial court considered evidence of the parties' estates and earnings, in addition to defendant's needs as a dependent spouse. The trial court found that defendant's reasonable needs to enable her to maintain her standard of living as established in the 1990 order was in excess of \$2,500.00 per month. The court further found that at the time of the 1990 order defendant was earning \$1,208.00 gross income per month with a net income of \$800.00 per month, and at the time of the 1995 order, defendant's gross earnings were \$2,860.00 per month with a net income of \$2,136.00 per month—more than twice her gross income at the time of the previous order. Further, defendant's debts had been reduced to one-eighth of what they had been in 1990, and

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she had also obtained substantial equity in her house. After considering this evidence and determining that plaintiff's gross income did not include his corporation's cash reserve, the trial court determined that a change of circumstances had occurred warranting a reduction in plaintiff's alimony obligation. Because the trial court properly considered all relevant factors in determining the amount of plaintiff's alimony obligation, it did not abuse its discretion in reducing such obligation.

Finally, the trial court did not modify defendant's accustomed standard of living from that determined in the 1990 order. The trial court acknowledged that, at the time of the 1990 order, defendant needed an amount in excess of \$2,500.00 per month to maintain her accustomed standard of living during the marriage, and that defendant never returned to such standard of living. However, according to defendant's affidavit, her reasonable living expenses in 1995 were found to be \$2,643.00. When the alimony awarded to defendant by the trial court (\$532.00) is added to defendant's present net income (\$2,136.00), the result is an amount which exceeds \$2,500.00. I conclude the trial court considered defendant's accustomed standard of living as set forth in the 1990 order and that further findings are not necessary in determining the amount of defendant's alimony award in the 1995 order.

For the above reasons, I would affirm the trial court's order.

WAKE COUNTY HOSPITAL SYSTEM, INC. AND ST. PAUL FIRE AND MARINE INSURANCE COMPANY, PLAINTIFFS V. SAFETY NATIONAL CASUALTY CORPORATION, DEFENDANT

No. COA96-1038

(Filed 5 August 1997)

1. Workers' Compensation § 132 (NCI4th)— assault by fellow employee—action by employer under excess workers' compensation policy—causal relationship to job

The trial court properly granted summary judgment for defendant-insurer, Safety, on plaintiff's breach of contract claim where an employee of plaintiff-Hospital was abducted, raped, and murdered by another employee; the victim's estate and family brought an action against the Hospital seeking damages for

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wrongful death and infliction of emotional distress arising from the Hospital negligently hiring, supervising, and retaining the employee who committed the crime without regard to his violent propensities; the Hospital notified both St. Paul, which had issued to the Hospital a general liability policy and an umbrella excess policy, and this defendant, Safety, which had issued a "Specific Excess and Aggregate Excess Workers' Compensation Insurance Agreement"; and, as a result of a settlement in which it did not participate, the Hospital filed this action for the amount allegedly owed under Safety's policy. The courts in North Carolina have consistently held that an intentional assault in the workplace by a fellow employee or third party is an accident that occurs in the course of employment but does not arise out of the employment unless a job related motivation or some other causal relation between the job and the assault exists. Following the reasoning of *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, the facts are sufficient to show a causal relationship between Mrs. Crews' employment and her death; however, discovery materials established that death benefits payable under the Workers' Compensation Act were within the Hospital's self-insured retention and Safety's excess coverage would not apply.

2. Workers' Compensation § 132 (NC14th)— assault by coworker—allegations of negligent hiring—workers' compensation—exclusivity provisions

No coverage was provided to plaintiff-Hospital under an excess workers' compensation insurance policy where an employee was abducted, raped, and murdered by another employee, the workers' compensation coverage did not apply, and the hospital contended that the estate was entitled to maintain an action outside the Workers' Compensation Act for negligent hiring and retention under policy language concerning "Employers' Liability Laws." The exclusivity provision of the Workers' Compensation Act precludes a claim for ordinary negligence, with an exception for claims meeting the stringent proof standards of *Woodson v. Rowland*, 329 N.C. 330, but employees have not been permitted to recover damages from an employer in a *Woodson* claim for injury or death resulting from negligent hiring or retention. Although the allegations here may be sufficient to allege that the Hospital was negligent in hiring, firing and retaining the employee who committed the crime, they do not meet the requirements of *Woodson*. Even assuming a *Woodson*

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claim that could survive dismissal, this policy provides coverage only for losses sustained due to an “occurrence,” which is defined as an “accident.” “Accident” is not defined, but it is clear that conduct sufficient to support a *Woodson* claim cannot be deemed an “accident”; therefore such conduct cannot constitute an occurrence within the meaning of this policy.

3. Insurance § 949 (NCI4th)— excess workers’ compensation coverage—negligent hiring and retention

Coverage was not provided under an excess workers’ compensation policy for the employer-hospital’s liability under an ordinary negligence claim by the estate of an employee who was abducted, raped, and murdered by another employee. An employee may bring a common law action for personal injury against his or her employer where the injury is not connected to the employment, but the claim would not be covered by this policy because the hospital’s liability would not flow from its capacity as an employer and therefore would not arise under “Employers’ Liability Laws” under the policy. Moreover, the general liability policy from the other insurer, St. Paul, would provide coverage with limits sufficient to satisfy the entire settlement in this case.

4. Unfair Competition or Trade Practices § 39 (NCI4th)— excess workers’ compensation insurance coverage—no coverage of common law actions—no unfair practices

An insurer (Safety) did not commit an unfair and deceptive trade practice by selling a policy to plaintiff-Hospital representing that the policy provided coverage under “Employers’ Liability Laws” without warning that it would subsequently take the position that the policy did not provide coverage against common law actions that are not barred by the exclusivity provisions of the Workers’ Compensation Act. Although not specifically pleaded, the Hospital argues that Safety misrepresented its coverage in violation of statutes which define unfair acts and practices in the insurance industry, but they did not make the necessary allegation that Safety engaged in prohibited conduct with such frequency as to indicate a general business practice. Even if an unfair and deceptive practice was properly alleged, the policy was labeled a “Specific Excess and Aggregate Excess Workers’ Compensation Insurance Agreement” and the Hospital’s executive vice-president stated in his deposition that the Hospital

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bought the policy for the purpose of having excess workers' compensation coverage. The policy provides narrow coverage, but narrow coverage in and of itself is not illusory or deceptive. There is no evidence that Safety misrepresented the extent of the coverage provided by the policy.

Appeal by plaintiffs from order entered 22 May 1996 by Judge Julius A. Rousseau, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 30 April 1997.

Smith Helms Mulliss & Moore, L.L.P., by Martin N. Erwin for plaintiff-appellants.

Robinson Maready Lawing & Comerford, L.L.P., by Robert J. Lawing and Jane C. Jackson for defendant-appellee.

MARTIN, John C., Judge.

Wake County Hospital System, Inc., ("the Hospital") brought this action to recover under an insurance policy issued by defendant Safety National Casualty Corporation ("Safety"). Defendant answered, denying that its policy provided coverage for the claim asserted by the Hospital. Defendant's motion to join St. Paul Fire and Marine Insurance Company ("St. Paul") as a party plaintiff was granted. After discovery, all parties moved for summary judgment.

The materials before the trial court established the following:

Defendant Safety issued its "Specific Excess and Aggregate Excess Workers' Compensation Insurance Agreement" to the Hospital, providing coverage for "Loss sustained . . . because of liability imposed . . . by the Workers' Compensation or Employers' Liability Laws of: [North Carolina] . . . on account of bodily injury or occupational disease due to Occurrences taking place . . . to Employees. . . ." The policy was excess coverage to the Hospital's self-insured retention of \$225,000 and provided coverage of \$500,000. The policy was in force at all times pertinent to this action.

In addition, at all times pertinent to this action, the Hospital was covered by two policies issued by St. Paul. One policy was a general liability policy providing coverage of \$1,000,000 for a "covered bodily injury" "caused by an event" and excluding from coverage bodily injury which was "expected or intended by a protected person," "bodily injury to any employee arising out of and in the course of . . . employment," and any obligation under the workers' compensation

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laws. The other St. Paul policy was an Umbrella Excess policy with a coverage limit of \$10,000,000 providing excess coverage for claims covered by listed underlying policies, including both the Safety policy and the St. Paul general liability policy.

On 8 August 1990, Kimberly Crews was employed as a social worker by the Hospital. As she was leaving work on that date, she was abducted in the Hospital's parking lot by Michael Sexton, a Hospital employee who worked in the laundry. Sexton forced Mrs. Crews to drive him to a location away from the Hospital, where he raped and murdered her. Sexton was subsequently convicted of kidnapping, rape, and murder. On 10 July 1992, Mrs. Crews' husband, who was the administrator of her estate, and her minor child brought an action ("the Crews lawsuit") against the Hospital seeking compensatory and punitive damages for her wrongful death and for infliction of emotional distress. The complaint in the Crews lawsuit alleged that the Hospital negligently hired, supervised, and retained Michael Sexton without regard to his violent propensities and that the Hospital's gross negligence subjected Mrs. Crews and other employees to an unreasonable risk and a substantial certainty of serious injury.

The Hospital placed both St. Paul and Safety on notice when the Crews lawsuit was filed. St. Paul issued a reservation of rights letter and agreed to provide the Hospital with a defense. Safety also issued a reservation of rights letter, but under the terms of its policy, Safety had no obligation to provide a defense.

At a settlement conference conducted in connection with the Crews lawsuit, the Hospital and St. Paul indicated their willingness, in principle, to contribute to a settlement in the amount of \$1,000,000, even if Safety declined to participate. When Safety announced that it would not participate in the settlement, the Hospital and St. Paul entered into a Loan Receipt and Non-Waiver Agreement, pursuant to which the Hospital contributed its self-insured retention of \$225,000 and St. Paul contributed \$275,000, the amount for which it would be liable if Safety contributed its limits of \$500,000. Of the remaining \$500,000, the Hospital paid \$250,000 and St. Paul "loaned" the Hospital the remaining \$250,000 to be repaid from any amounts recovered in this action. Safety agreed that if the Hospital elected to proceed with a settlement of the underlying action, Safety would not raise as a defense in any later litigation the absence of consent under the Safety policy.

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After completing settlement of the Crews lawsuit, the Hospital filed the present action alleging that Safety owes \$500,000 under its policy, and that its denial of coverage constitutes an unfair and deceptive practice. The trial court granted Safety's motion for summary judgment. Plaintiffs appeal.

A party moving for summary judgment must establish that there is no genuine issue of material fact and that the party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56; *Glover v. First Union National Bank*, 109 N.C. App. 451, 428 S.E.2d 206 (1993). There are no disputed issues of fact in this case; resolution of the issue of Safety's coverage involves questions of law, properly resolved by summary judgment. *Waste Management v. Peerless Insurance Co.*, 315 N.C. 688, 340 S.E.2d 374, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986); *Duke University v. St. Paul Fire and Marine Insurance Co.*, 96 N.C. App. 635, 386 S.E.2d 762, *disc. review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990).

I.

In their first argument, plaintiffs contend the Safety policy provides coverage for the Hospital's liability in this case. They argue that the policy provides coverage for liability imposed under "Employers' Liability Laws," language which is sufficiently broad to include liability for negligent hiring, supervision and retention, and liability imposed pursuant to *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991) (holding that misconduct by an employer which is substantially certain to cause injury to an employee is actionable at common law, notwithstanding the exclusivity provisions of the Workers' Compensation Act). Defendant contends that, no matter which analysis we choose to apply to determine the basis for the Hospital's liability to the Crews plaintiffs, the end result is that the Safety policy does not provide coverage to the Hospital. We agree with defendant.

A.

[1] Because the policy was a "Specific Excess and Aggregate Excess Workers' Compensation Insurance Agreement," we must first determine whether the Hospital had liability under the Workers' Compensation Act for the injuries to Mrs. Crews. In order for an injury to be compensable under the Workers' Compensation Act, a claimant must prove: "(1) [t]hat the injury was caused by an accident; (2) that the injury arose out of the employment; and (3) that the injury

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was sustained in the course of employment.” See *Gallimore v. Marilyn’s Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977).

In North Carolina, courts have consistently held that an intentional assault in the work place by a fellow employee or third party is an accident that occurs in the course of employment, but does not arise out of the employment unless a job-related motivation or some other causal relation between the job and the assault exists. *Gallimore*, 292 N.C. 399, 233 S.E.2d 529 (holding that the death of an employee at a shopping mall who was kidnaped in the parking lot by a third party did not arise out of the employment because the risk of assault was common to the neighborhood, not peculiar to the employment); *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 377 S.E.2d 777, *affirmed*, 325 N.C. 702, 386 S.E.2d 174 (1989) (holding that a causal relation existed between the employment and the assault of a resort employee who was kidnaped and assaulted by a guest of the resort); *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 340 S.E.2d 116, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986) (holding that sexual harassment did not arise out of the employment for a waitress because it was not a risk to which an employee is exposed because of the nature of the employment).

We must determine whether a causal relation exists in this case between Ms. Crews’ job and the assault such that the death arose out of the employment and is compensable under the Workers’ Compensation Act. Here, the evidence indicates that Mrs. Crews was abducted from the employee parking lot, she was assaulted and killed on an adjacent street, she was carrying work materials, and the assailant was a co-employee. The case of *Culpepper v. Fairfield Sapphire Valley*, *supra*, is illustrative. In *Culpepper*, plaintiff was a cocktail waitress at a resort who was on her way home from work when she noticed a driver having car trouble on the side of the road leading to the resort. She recognized the driver as a resort guest and given her employer’s instructions to be courteous to resort guests, she stopped in order to assist the guest. She was kidnaped and assaulted by the driver. In holding that plaintiff’s injuries were compensable under the Workers’ Compensation Act, the Court concluded that there was a causal relation between plaintiff’s employment and the assault such that the plaintiff’s injuries arose out of her employment. In addition, the Court stated that “course of employment” included the employer’s premises and may extend to adjacent premises or roads. *Id.* Following the reasoning in *Culpepper*, we believe the facts here are sufficient to show a causal relation-

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ship between Mrs. Crews' employment and her death. Thus, Mrs. Crews' death was compensable under the Workers' Compensation Act. Discovery materials established that death benefits in the amount of \$176,500 would be payable to Mrs. Crews' estate under the Workers' Compensation Act, an amount within the Hospital's self-insured retention. Therefore, Safety's excess coverage would not apply.

[2] The Hospital contends, however, that Mrs. Crews' estate was entitled to maintain an action outside the Workers' Compensation Act for negligent hiring and retention, and that the Hospital's liability in such an action is covered under the language of the Safety policy providing coverage for the Hospital's liability imposed by "Employers' Liability Laws." Under the Workers' Compensation Act, an employee's remedies are exclusive as against the employer where the injury is caused by an accident arising out of and in the course of employment. N.C. Gen. Stat. § 97-10.1 (1991). Thus, the exclusivity provision of the Act precludes a claim for ordinary negligence, even when the employer's conduct constitutes willful or wanton negligence. *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 364 S.E.2d 186 (1988); *Stack v. Mecklenburg County*, 86 N.C. App. 550, 359 S.E.2d 16, *disc. review denied*, 321 N.C. 121, 361 S.E.2d 597 (1987). However, an exception to this exclusivity exists for claims meeting the stringent proof standards of *Woodson*, 329 N.C. 330, 407 S.E.2d 222. *Woodson* permits a plaintiff to pursue both a workers' compensation suit and a civil suit against an employer in those narrowly limited cases where injury or death "was the result of intentional conduct by [an] employer which the employer knew was substantially certain to cause serious injury or death. . . ." *Id.* at 337, 407 S.E.2d at 226. Willful and wanton negligence alone is not enough to establish a *Woodson* claim; a higher degree of negligence is required. *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993). "The conduct must be so egregious as to be tantamount to an intentional tort." *Id.* at 239, 424 S.E.2d at 395.

Employees have not been permitted to recover damages from an employer in a *Woodson* claim for injury or death resulting from negligent hiring or retention. *Bynum v. Fredrickson Motor Express Corp.*, 112 N.C. App. 125, 434 S.E.2d 241 (1993) (holding that employer's conduct did not rise to the level of proof required for a *Woodson* claim sufficient for a claim of negligent hiring where the plaintiff was injured by the negligence of a co-worker). Here, the only allegations contained in the complaint in the Crews lawsuit that could possibly

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be construed as asserting a *Woodson* claim were that the Hospital hired a laundry employee with a relatively minor criminal record, and failed to fire that employee even though it had knowledge that he had engaged in sexual relations with other hospital employees at work, knew that he had a violent temper, and had knowledge of his alleged but unproven altercations with female co-employees in which no one was injured. Though these allegations may be sufficient to allege that the Hospital was negligent in hiring and retaining Sexton, the allegations are insufficient to allege conduct on the part of the Hospital substantially certain to cause injury or death and, therefore, do not meet the stringent requirements of *Woodson*. Without a *Woodson* claim, workers' compensation is the only remedy available in this case; any other action is barred as a matter of law. Since there is no other claim asserted in the Crews lawsuit by which the Hospital may be held liable under "Employers' Liability Laws," there is no coverage provided by the Safety policy.

Moreover, even if we assume *arguendo* that a *Woodson* claim could survive dismissal, Safety would still not be liable for coverage under its policy. The Safety policy provides coverage only for losses sustained due to an "occurrence." Occurrence is defined as an "accident," but accident is not defined within the terms of the policy.

In *N.C. Farm Bureau Mut. Ins. Co. v. Stox*, 330 N.C. 697, 412 S.E.2d 318 (1992), the Supreme Court makes it clear that conduct sufficient to support a *Woodson* claim cannot be deemed an "accident" and, therefore, cannot constitute an "occurrence" within the meaning of the Safety policy. This holding that the degree of intent required to establish a *Woodson* claim could not constitute an "accident" was confirmed by the Court's decisions in *Lyles v. City of Charlotte*, 344 N.C. 676, 477 S.E.2d 150 (1996), *reh'g denied*, 345 N.C. 355, 483 S.E.2d 170 (1997) (holding that plaintiff's claim that the City's action was substantially certain to cause injury amounted to a claim that the occurrence was not accidental, thereby removing the claim from coverage under the policy) and *Russ v. Great American Ins. Companies*, 121 N.C. App. 185, 464 S.E.2d 723 (1995), *disc. review denied*, 342 N.C. 896, 467 S.E.2d 905 (1996) (holding that an injury that is intentional or substantially certain to be the result of an intentional act is not an accident).

In view of these cases, if Mrs. Crews' estate could have met the stringent requirements for a *Woodson* claim by showing that the Hospital's negligent conduct was "substantially certain to cause death or serious injury," under *Stox* such conduct would not be accidental

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and, therefore, not an “occurrence” within the meaning of the Safety policy.

B.

[3] If we assume *arguendo* that Mrs. Crews’ death was not compensable under the Workers’ Compensation Act, we must determine whether Safety provided coverage for the Hospital’s liability under an ordinary negligence claim. We hold that it would not.

An employee may certainly bring a common law action for personal injury against his or her employer where the injury is not connected to the employment.

The Workmen’s Compensation Act relates to the rights and liabilities of employee and employer by reason of injuries . . . arising out of and in the course of the employment relationship. . . . The Act does not, however, take away any common law right of the employee, even as against the employer, provided the right be one which is disconnected with the employment and pertains to the employee, not as an employee but as a member of the public (citations omitted).

Bryant v. Dougherty, 267 N.C. 545, 548, 148 S.E.2d 548, 551 (1966). Thus, if Mrs. Crews’ estate contended and established that her death was due to the Hospital’s negligent breach of some duty owed her, not as an employee but as a member of the public, it could maintain an action at common law to recover for such negligence. In such event, however, the claim would not be covered by the Safety policy because the Hospital’s liability would not flow from its capacity as an employer and, therefore, would not arise under “Employers’ Liability Laws.” Moreover, as acknowledged by St. Paul in discovery, in such a case, the St. Paul general liability policy would provide “dollar one” coverage, with limits sufficient to satisfy the entire settlement in this case.

Thus, defendant has met the burden of establishing that there is no genuine issue of material fact and, accordingly, defendant’s motion for summary judgment on plaintiff’s breach of contract claim was properly allowed.

II.

[4] Plaintiffs next contend that Safety committed an unfair and deceptive practice because it sold the Hospital a policy that deceptively represented that it provided coverage under “Employers’

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Liability Laws” without warning that it would subsequently take the position that the policy did not provide coverage for the Hospital’s liability against “the right of employees to bring common law actions against employers that are not barred by the exclusivity provisions of the Workers’ Compensation Act.” Thus, plaintiffs assert, the policy was illusory. We reject these contentions.

“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” N.C. Gen. Stat. § 75-1.1(a) (1994). To support an unfair trade practice claim, a plaintiff must show: “(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business.” *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991).

Although not specifically pleaded, the Hospital argues that Safety misrepresented the coverage provided by its policy, in violation of G.S. § 58-63-15(1) and G.S. § 58-63-15(11)(a), statutes which define acts as unfair acts and practices in the insurance business. Initially we note that, to state a claim for an unfair and deceptive practice under G.S. § 58-63-15(11)(a), a party must allege that the defendant insurer engaged in the prohibited conduct “with such frequency as to indicate a general business practice.” N.C. Gen. Stat. § 58-63-15(11)(a) (1994); *Von Hagel v. Blue Cross & Blue Shield*, 91 N.C. App. 58, 60, 370 S.E.2d 695, 698 (1988). In their complaint, plaintiffs Hospital and St. Paul made no such allegations against Safety. *Beasley v. National Savings Life Ins. Co.*, 75 N.C. App. 104, 330 S.E.2d 207 (1985), *disc. review improv. allowed*, 316 N.C. 372, 341 S.E.2d 338 (1986) (affirming dismissal of action where plaintiff failed to plead that alleged violations occurred with such frequency as to indicate a general business practice).

Even if an unfair and deceptive practice was properly alleged, plaintiffs’ showing at summary judgment is insufficient to show a genuine issue of material fact and to survive entry of summary judgment in defendant’s favor. The Safety policy was labeled a “Specific Excess and Aggregate Excess Workers’ Compensation Insurance Agreement.” It provided coverage in excess of the Hospital’s \$225,000 self-insured retention obligation. The Hospital’s Executive Vice-President stated in his deposition that the Hospital bought the Safety policy for the purpose of having excess workers’ compensation coverage. The policy provides narrow coverage, but narrow coverage in

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and of itself is not illusory or deceptive. There is no evidence that Safety misrepresented the extent of the coverage provided by the policy. Accordingly, we find that summary judgment was properly granted in defendant's favor as to the Hospital's claim for unfair and deceptive practices.

The order of the trial court is

Affirmed.

Judges COZORT and McGEE concur.

Judge Cozort concurred in this opinion on or before 31 July 1997.

LISA NORMAN, PETITIONER-APPELLANT v. C.C. CAMERON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, AND DAVID N. EDWARDS, JR., IN HIS OFFICIAL CAPACITY AS CO-CHAIRMAN OF THE STATE RESIDENCE COMMITTEE OF THE UNIVERSITY OF NORTH CAROLINA, RESPONDENT-APPELLEES

No. COA96-903

STEPHANIE FOUST, PETITIONER-APPELLANT v. C.C. CAMERON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, AND DAVID N. EDWARDS, JR., IN HIS OFFICIAL CAPACITY AS CO-CHAIRMAN OF THE STATE RESIDENCE COMMITTEE OF THE UNIVERSITY OF NORTH CAROLINA, RESPONDENT-APPELLEES

No. COA96-912

(Filed 5 August 1997)

1. Colleges and Universities § 29 (NCI4th)— university tuition—state residency denied

Decisions by the University of North Carolina State Residence Committee (SRC) denying applications for state residency for tuition purposes were supported by substantial evidence in the whole record. The superior court's orders show that the correct standard of review was applied; both petitioners are presumed to have the same domicile as their parents because their living parents have established legal residences in other states and neither have lived in North Carolina for five consecutive years; the emphasis in their applications on educational opportunities combined with the fact that they immediately

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enrolled at UNC-G upon their arrival support the reasonable inference that their presence in the State was incident to enrollment in an institution of higher education; additionally, neither petitioner has held a full-time or permanent job in the state, with both working only part-time, including work as research assistants at UNC-G; both petitioners made statements which would support a finding that they intend to reside in North Carolina permanently; and the fact that both women closely linked these general intentions with hopes of finding jobs in the Greensboro area reasonably supports the inference that their interest in North Carolina is contingent on their ability to find permanent jobs here after graduating from UNC-G. The SRC is required to give careful consideration to a petitioner's statement of intentions, but it is not required to accept these statements at face value.

2. Colleges and Universities § 29 (NCI4th)— university tuition—state residency denied—procedural due process

Petitioners' state and federal constitutional rights to procedural due process were not violated in the denial of their applications for state residency for tuition purposes. From a constitutional perspective, petitioners' monetary interest in obtaining state residence is less significant than other more fundamental interests. The General Assembly and our state universities have a substantial interest in seeing that only bona fide state residents are afforded that status for tuition purposes, so that our universities do not become migratory destinations for out-of-state residents who move here chiefly to take advantage of the low tuition for quality education. Additionally, given the potentially large number of applicants for state residency status, the university has a significant interest in efficient and streamlined procedures for reviewing applicant qualifications. There is no serious risk that the procedures actually used in reviewing petitioners' applications would result in an erroneous deprivation of their interests in state residency status and there is minimal benefit from the additional procedures which petitioners assert due process requires. Although petitioners assert that a balancing test should be applied, they do not contend that the North Carolina Constitution affords due process protection different from or in addition to that provided by the federal constitution. There is no violation of federal constitutional rights and claims under the North Carolina Constitution are not further addressed.

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Appeals by petitioners from orders entered 14 June 1995 by Judge Ben F. Tennille in Guilford County Superior Court. Heard in the Court of Appeals 23 April 1997.

Central Carolina Legal Services, Inc., by Brenda Bergeron and Stanley B. Sprague, for petitioner-appellants.

Attorney General Michael F. Easley, by Assistant Attorney General Thomas O. Lawton, III, for respondent-appellees.

McGEE, Judge.

Upon motion of respondents and by order filed 11 September 1996, this Court consolidated these appeals, both of which raise substantially identical issues for review. Petitioners challenge the trial court's decision: (1) to affirm the University of North Carolina's denial of their applications for state residency for tuition purposes, and (2) to dismiss their declaratory judgment claims. Both petitioners claim the University's decisions are not supported by substantial evidence and that the procedures used by the University in denying their applications violated their due process rights under our federal and state constitutions. We affirm the trial court's decisions.

On 1 August 1995 Lisa Norman and Stephanie Foust filed applications with the University of North Carolina-Greensboro (UNC-G), seeking classification as state residents for tuition purposes. On 7 August 1995, UNC-G's Office of the Provost (Provost) denied both applications. Petitioners appealed and on 25 September 1995, the UNC-G Residence Appeals Committee (RAC) affirmed the Provost's decisions. Petitioners appealed to the University of North Carolina State Residence Committee (SRC) which upheld the RAC's decision as to both petitioners on 22 January 1996. On 21 February 1996, both Norman and Foust filed petitions in Guilford County Superior Court for judicial review under N.C. Gen. Stat. § 150B-43 *et seq.* and for declaratory judgments under N.C. Gen. Stat. § 1-253 *et seq.* Petitioners amended their petitions on 18 March 1996. Respondents moved to dismiss the declaratory judgment actions. By orders entered 14 June 1996, the trial court dismissed petitioners' declaratory judgment actions for failure to state a claim on which relief could be granted and affirmed the SRC's decisions denying petitioners state residency status for tuition purposes.

In her application and at the hearing, petitioner Norman provided the following information. She was born 10 August 1966 in Buffalo,

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New York. From birth until her move to Greensboro in 1994, she claimed domicile at her parents' address in Williamsville, New York where her parents still live and where she graduated from high school in June 1984. After high school, she attended various colleges, community colleges, and universities in Buffalo, New York and in Ohio. She moved to Greensboro in August 1994 for the "educational and professional opportunities that are available." Immediately upon arriving in North Carolina, she enrolled at UNC-G and, after completing her first year of study, filed her application for state residency status. She submitted proof of a North Carolina driver's license, voter and vehicle registration in North Carolina, part-time employment in North Carolina, and payment of vehicle and income taxes in North Carolina. During the year after her arrival in Greensboro, she held a part-time job at a clothing store and a part-time job as a research assistant at UNC-G. In her application, she stated her earnings provided 100% of her support and testified in her affidavit that she was involved in the Greensboro community. She also testified: "I do not intend on picking up and going to live with my parents again"; "this is where I need to be if I am going to find a good job"; and "I have a wonderful future here."

Petitioner Foust provided the following information in support of her application. She was born 14 December 1968 in Altoona, Pennsylvania, and graduated from high school there in 1986. Her father still lives there; her mother moved to Virginia in 1993. From 1986 to 1990 she attended college in Pennsylvania. In her application she stated that, after graduation from college, she traveled for four years and then decided "to make my home" in North Carolina. Her last address prior to moving to North Carolina was Duncansville, Pennsylvania. She chose to move to Greensboro "because of its importance in the textile industry and the educational opportunities it offered to me." Upon her arrival, she enrolled at UNC-G, registered to vote in North Carolina, registered her vehicle in North Carolina, paid vehicle and income taxes in North Carolina, and obtained a North Carolina driver's license. She stated she was financially independent of her parents. Since her arrival in Greensboro, Foust has held part-time jobs as a research or graduate assistant at UNC-G. In her affidavit, she testified: "I have every intention of continuing my professional life in North Carolina. I have volunteered at the furniture market, worked as a research assistant and become involved in the community. I am putting down roots."

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[1] Norman and Foust first contend the trial court should have reversed the SRC's decisions as unsupported by substantial evidence. We disagree.

When reviewing a superior court order affirming or reversing a final agency decision, an appellate court must examine the order for error of law and determine (1) whether the superior court "exercised the appropriate scope of review and, if appropriate," (2) decide "whether the court did so properly." *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994)).

The standard of review applied by a superior court when reviewing a final agency decision "depends upon the particular issues presented on appeal." *ACT-UP Triangle*, 345 N.C. at 706, 483 S.E.2d at 392 (quoting *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118). The superior court may reverse or modify the agency's decision "if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions, are: . . . (5) [u]nsupported by substantial evidence . . . in view of the entire record as submitted." N.C. Gen. Stat. § 150B-51(b)(5) (1995). Substantial evidence is "more than a scintilla" and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982). Review of the whole record requires the court "to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.'" *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118.

In both of the instant cases, the superior court's orders show the correct standard of review was applied. Both orders provide: "[h]aving considered the record of the agency proceedings and the arguments and submissions of counsel, the Court determines that the decision is supported by substantial evidence in the record." In addition, upon review of the whole records in both cases, we affirm the superior court's findings of substantial evidence.

N.C. Gen. Stat. § 116-143.1(b) (1994) provides, in pertinent part:

(b) To qualify as a resident for tuition purposes, a person must have established legal residence (domicile) in North Carolina and maintained that legal residence for at least 12 months im-

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mediately prior to his or her classification as a resident for tuition purposes.

(c) To be eligible for classification as a resident for tuition purposes, a person must establish that his or her presence in the State currently is, and during the requisite 12-month qualifying period was, for purposes of maintaining a bona fide domicile rather than of maintaining a mere temporary residence or abode incident to enrollment in an institution of higher education.

The legal residence of a person's living parents is prima facie evidence of that person's legal residence. G.S. § 116-143.1(e). This presumption "may be reinforced or rebutted relative to the age and general circumstances of the individual." *Id.* However, G.S. § 116-143.1(e) provides that if the individual has lived in the state for five consecutive years prior to enrollment, the legal residence of his or her parents when domiciled out of the state is not prima facie evidence of the individual's legal residence. "A 'legal resident' or 'resident' is a person who qualifies as a domiciliary of North Carolina." G.S. § 116-143.1(a)(1). "Domicile" is "one's permanent, established home as distinguished from a temporary, although actual, place of residence." *Hall v. Board of Elections*, 280 N.C. 600, 605, 187 S.E.2d 52, 55 (1972).

Under G.S. § 116-143.1(e), both Norman and Foust are presumed to have the same domicile as their parents because their living parents have established legal residences in other states and neither Norman nor Foust have lived in North Carolina for five consecutive years. In answering why she moved to North Carolina, Norman stressed in her application the "educational and professional opportunities" available in Greensboro. (Emphasis added). In Foust's application, she stated she came to North Carolina "for educational opportunities." (Emphasis added). This emphasis on educational opportunities by both Norman and Foust combined with the fact that they both immediately enrolled at UNC-G upon their arrival in North Carolina support the reasonable inference that their "presence in the State" was "incident to enrollment in an institution of higher education" rather than "for purposes of maintaining a bona fide domicile" pursuant to G.S. § 116-143.1(c). In addition, neither Norman nor Foust have held full-time or permanent jobs in this state. Both have worked only part-time, including work as research assistants at UNC-G.

Both women did make statements which would support a finding that they intended to reside in North Carolina permanently. However,

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the fact that both women closely linked these general intentions with hopes of finding jobs in the Greensboro area reasonably supports the inference that their interest in North Carolina is contingent on their ability to find permanent jobs here after graduating from UNC-G. Although the SRC should give careful consideration to a petitioner's statement of intentions, it is not required to accept these statements at face value. "[A]s between the agency which has expertise in its area and the reviewing court, the agency is in a better position to 'determine the weight and sufficiency of the evidence and the credibility of the witnesses.'" *Wilson v. State Residence Committee of U.N.C.*, 92 N.C. App. 355, 358, 374 S.E.2d 415, 416 (1988) (quoting *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565 (1980)), *disc. review denied*, 324 N.C. 252, 377 S.E.2d 764 (1989). We hold the SRC's decisions denying Norman's and Foust's petitions are supported by substantial evidence in the whole record.

[2] Norman and Foust next contend the SRC violated their federal and state constitutional rights to procedural due process. For this reason, they contend the trial court should have reversed the SRC's decisions under G.S. § 150B-51(b).

Under the United States Constitution, the threshold requirement for a procedural due process claim is that the complainant must have a protected liberty or property interest in the benefit claimed. *See Board of Regents v. Roth*, 408 U.S. 564, 569, 33 L. Ed. 2d 548, 556 (1972). If the complainant is found to have such an interest, a reviewing court must then assess the adequacy of the procedures used by balancing the following factors: (1) the private interest affected; (2) the risk of "an erroneous deprivation" of this interest through the procedures used and "the probable value, if any, of additional or substitute procedural safeguards"; and (3) the state's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 33 (1976).

Here, we need not decide whether Norman and Foust have a protected liberty or property interest as applicants for state residency status for tuition purposes because we hold, even if they have such an interest, the procedures applied in reviewing their applications were constitutionally adequate.

We first evaluate the private versus the governmental interests affected. We acknowledge that, from a monetary perspective, petitioners' interests in obtaining state residency status is significant

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because of the future potential reduction in tuition. However, from a constitutional perspective, petitioners' interest is less significant than other more fundamental interests. *See Lister v. Hoover*, 706 F.2d 796, 802-803 (1983).

In contrast, our General Assembly and our state universities have a substantial interest in only bona fide state residents for tuition purposes being afforded this status. That is, our state university system has a serious interest in our universities not becoming migratory destinations for out-of-state residents who move here chiefly to take advantage of the low tuition for quality education available for residents at these universities. In addition, given the potentially large number of applicants for state residency status at our state universities, our state university system has a significant interest in efficient and streamlined procedures for reviewing applicant qualifications.

We find no serious risk that the procedures actually used in reviewing petitioners' applications would result in an erroneous deprivation of their interests in state residency status. The process provided included the following: (1) the application for state residency status notified petitioners of the applicable statutes and regulations and made copies of these available for inspection; (2) the application included detailed questions specific to the applicant and provided the applicant the opportunity to attach additional material in support of the application; and (3) the letters from the Provost denying petitioners' applications referred them to a manual explaining the decision-making process used, made this manual available, notified petitioners of their appeal rights, and provided them a copy of the appeal procedure.

At the RAC hearings, petitioners and their attorneys were allowed to attend the hearing and petitioners were given the opportunity to speak. At the hearings, the RAC reviewed the material in petitioners' files but did not permit them to submit new factual assertions. However, according to the appeals procedure, if an applicant desires to present new information, the RAC will remand the case to the Provost's office for consideration of the new information. After being notified in writing of the RAC's decisions, petitioners were given an opportunity to appeal to the SRC. After considering petitioners' appeals, the SRC sent petitioners letters addressing their procedural concerns and denying the requested relief on the grounds that the records contained a reasonable basis for UNC-G's determination that they had not proven their claims for state residency. These proce-

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dures allowed petitioners to build an initial record in support of their applications, to have a face-to-face hearing before the RAC, and to have the SRC review for any legal and procedural errors and for abuse of discretion.

Norman and Foust assert due process requires the following additional procedures. First, they contend the RAC must allow them to present new evidence at the hearing and that the SRC should make an independent decision on review rather than merely reviewing UNC-G's initial decision for errors. We find little probable value, if any, in these additional procedures. Petitioners are given ample opportunity in their applications to provide supportive material. If circumstances should change after the initial application, the applicant may request the application be remanded to the Provost for review of the additional information.

Petitioners also assert due process requires the RAC make a record, such as a tape recording, transcript, or summary of evidence, of the hearings held on the applications and that the SRC review these records in making its decisions. We find the benefit of these additional procedures is minimal as well. Since no additional evidence is taken at the RAC hearing, there is no need to preserve additional evidence by a hearing transcript or other recording device.

We also find no merit in petitioners' assertions that due process requires the Provost, the RAC, and the SRC to provide more detailed explanations of the reasons why their applications were denied. The letters from the Provost stressed the preponderance of evidence standard and stated that the decisions were based on the information available. The minutes from the 25 September 1995 RAC meeting reviewing petitioners' applications state: "Insufficient evidence to overturn the original decision." The SRC letters informing petitioners of the SRC's decisions emphasized that petitioners were required to prove state residency status by a preponderance of evidence. These materials clarify that petitioners simply did not prove by a preponderance of evidence that they were entitled to the status. A requirement that the Provost, the RAC, and the SRC provide more detailed statements of reasons would likely impose considerable administrative burdens and delay with attendant financial costs. *See Lister*, 706 F.2d at 804. This burden would be magnified given the potentially large number of applicants for in-state tuition status in any given year. *See id.* Under the circumstances, the brief statement of reasons given by the Provost, the RAC, and the SRC were adequate.

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Foust asserts an additional procedure is required by due process, *i.e.*, that her attorney should have been permitted to make oral argument, to question his client, and to cross-examine other witnesses at the hearing. We disagree. The information relevant to a decision on Foust's application was within her control. She has not suggested there were key witnesses from whom she needed to get critical information by cross-examination. As to her own statements, Foust was given opportunity to speak to the RAC and to have an attorney help her prepare. Furthermore, she does not assert there is any factual dispute regarding the accuracy of the facts asserted in her application. Under the circumstances, we see little additional due process value in permitting Foust's attorney to question her and others at the hearing or in permitting her attorney to make arguments.

We also find no merit in petitioners' contention that the procedures used in denying their applications violated their procedural due process rights under the law of the land clause of Article I, Section 19 of our North Carolina Constitution. Petitioners assert the balancing test in *Mathews* should be applied in evaluating these rights. We question such an application given our Supreme Court's decision in *Henry v. Edmisten and Barbee v. Edmisten*, 315 N.C. 474, 480, 490-96, 340 S.E.2d 720, 725, 731-34 (1986). However, since petitioners do not contend our North Carolina Constitution affords any due process protection different from or in addition to that afforded by our federal constitution, and since we find no violation of petitioners' federal constitutional rights, we need not further address their claims under the North Carolina Constitution.

Petitioners also contend the trial court erred by dismissing their declaratory judgment actions for failure to state a claim upon which relief can be granted. In these actions, petitioners sought a declaration by the superior court that due process requires that the RAC institute certain additional procedures in reviewing applications for state residency status for tuition purposes. The procedures petitioners seek in their declaratory judgment actions are the same procedures addressed above and the due process concerns raised in these actions are the same as those raised in their petitions for judicial review. Since we have held the procedures provided are constitutionally adequate, it is not necessary to address the merits of petitioners' declaratory judgment actions further.

The trial court orders in both cases are affirmed.

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Affirmed.

Judges COZORT and MARTIN, John C., concur.

Judge Cozort participated in this opinion prior to his resignation on 31 July 1997.

STATE OF NORTH CAROLINA v. CLIVE HURST

No. COA96-802

(Filed 5 August 1997)

1. Evidence and Witnesses § 1009 (NCI4th)— murder and other drug related crimes—recorded statement—deceased witness to planning of crime—statement admissible

There was no prejudicial error in a noncapital prosecution for first-degree murder, breaking or entering, and other crimes in admitting a recorded oral statement from the deceased girlfriend of a participant where the girlfriend gave the recorded statement to police after being booked on unrelated drug charges; she indicated that defendant and others, including her boyfriend, had conceived a plan to break into the victim's house, steal cocaine, and kill the victim and her boyfriend; her body was found in New York City several months after giving this statement; and defendant contended that the statement lacked the inherent trustworthiness for admission under N.C.G.S. § 8C-1, Rule 804(b)(5). The girlfriend's unavailability was firmly established, the trial court found that the recorded oral statement was trustworthy, and the court's findings are supported by the evidence. She had personal knowledge of the plan; it was reasonable for the court to infer that she was motivated to speak the truth by her predicament; she never recanted or altered the statement; and she admitted participating in illegal drug trafficking. Although the court erred in detailing corroborating evidence in its findings of fact, it did not err in concluding that her statement was inherently trustworthy. Furthermore, defendant's participation in the robbery and murder was established by other evidence, including his own statement.

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2. Evidence and Witnesses § 862 (NCI4th)— murder and other crimes—recorded statement of girlfriend of participant—offered to establish defendant's participation in planning—admissible

The trial court did not err in a prosecution for noncapital first-degree murder, breaking or entering, and other crimes in admitting the recorded oral statement of the since deceased girlfriend of one of the participants where defendant contended that the statement contained the hearsay statements of two codefendants which do not fall under any recognized exception to the hearsay rule. Statements made by codefendants offered to establish the defendant's participation in the planning of a crime are not offered for the truth of the matter asserted.

3. Evidence and Witnesses § 2088 (NCI4th)— murder and other crimes—recorded statement of deceased witness—defendant's intent—excluded

The trial court did not err in a prosecution for noncapital first-degree murder, breaking or entering, and other crimes by admitting the recorded oral statement of the since deceased girlfriend of one of the participants but precluding admission of an exculpatory portion of the statement. The omitted portion of the statement is not a description of defendant's emotional response to the plan to kill the victim, but a statement of the witness's opinion that defendant may not have originally intended to participate in the plan. Furthermore, other evidence admitted at defendant's trial, including his own statement, established his willing participation in the plan to rob and kill the victim.

Appeal by defendant from judgments entered 7 February 1996 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 1 April 1997.

Beverly Drakeford was shot and killed outside her home in Durham, North Carolina on 16 October 1994. She was returning from New York with her adult sister Dedra, her nine year old brother, and her two children. Beverly had driven her boyfriend "Kool-Aid's" Toyota Cressida automobile to New York. When the family returned home to Durham, Beverly parked the Toyota in the driveway and gathered the children together to go inside the house. When Beverly and the children entered the house, they encountered four men later identified as the defendant, "Loopo" (whose real name was Somohora

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Mussa), "Gillie" a/k/a "Black" (whose real name is Anthony Hibbert), and a man known as "Sam," "Jay" or "Junker" (whose real name is Kadio Sumual). Beverly called out "[i]t's Loopo," then grabbed the three children and ran out the front of the house, instructing the children to run to a neighbor's house. Dedra ran and crouched by the driver's side door of the Toyota. From this location Dedra heard a "tear(ing) sound" which sounded like the opening of a window which had been painted shut, then she heard a "phffff" sound and saw a "little spark of light." Dedra looked up and saw Beverly standing in the front yard holding her neck and Loopo standing at the side entrance, staring out a door that had previously been nailed shut. Dedra then heard "someone ask(ing) him (Loopo) did he shoot her."

The four men approached Dedra and asked for the keys to the Toyota. Loopo stood over Dedra as she was crouching by the car. She pleaded "[p]lease, don't shoot me" and one of the other men, identified by Dedra as the man "with braids in his head," told Dedra "[n]obody is going to shoot you." Meanwhile, another of the four men found the car keys in the yard and the four men fled together in the Toyota.

After Loopo and the three other men got into the Toyota, Dedra ran up the street in search of Beverly. Beverly had been shot several times in the back and in the back of her head and had collapsed at a pole at the end of the driveway. Dedra was the first person to reach Beverly after the shooting. After calling Dedra's name several times, Beverly died at the scene.

All four men left the scene in the Toyota and drove to Loopo's Volkswagen Jetta. Gillie and the defendant got into the Jetta and Loopo and Jay followed in the Toyota. They later abandoned the Toyota and Jay and Loopo rejoined the defendant and Gillie in the Jetta. Officer Johnson sighted the four suspects in his patrol area and activated his lights and siren and followed the Jetta. The Jetta sped away with Officer Johnson and Officer Irving, a K-9 officer dispatched to the area with his dog, in pursuit. The Jetta came to an abrupt stop and three men got out and ran. Officer Johnson apprehended Gillie near the car. Loopo and the defendant ran for a fence. Loopo climbed over the fence and ran away but the defendant was apprehended by Officer Irving and his dog. Officer Irving's dog continued pursuing Loopo but failed to catch him. The dog then led officers to a bag containing an UZI automatic weapon and other evidence located on the other side of the fence where Loopo was last seen.

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Near the Jetta, a resident told Officer Irving that during his capture of the defendant and Gillie, a fourth man ran out of the car and down the street. That man, Jay, was found later hiding in a storage building. Evidence found in and around both cars included an UZI automatic weapon, a semiautomatic pistol, 1156 grams of crack cocaine, and cocaine processing materials.

Dedra identified Loopo from a photo line-up but was not able to identify the defendant or the other two men involved in the robbery and the shooting. Dedra was able to describe one of the men as having "braids in his head." The defendant wore his hair in dread locks at the time of the murder and the three other men wore their hair short.

While being booked on unrelated drug charges on 18 October 1994, Loopo's former girlfriend, Roneka Jackson, gave a short statement to police indicating that she had information about Beverly Drakeford's death. On 13 March 1995, Durham Police Investigator Early interviewed Roneka Jackson. Ms. Jackson told Investigator Early, in a tape recorded statement, that the defendant, Loopo, Gillie and Jay met in early October 1994 and conceived a plan to break into Beverly's house, steal cocaine, and kill Beverly and her boyfriend, "Kool-Aid." Roneka Jackson's stabbed and burned body was found in a dumpster in New York City several months after giving this statement to police.

After the defendant was taken into custody on 16 October 1994, he was interviewed by Investigator Early at 9:04 p.m. In his written statement, the defendant admitted that he went to Beverly Drakeford's house with Loopo, Gillie, and Jay but stated he was not aware of any plan to kill and rob Beverly Drakeford or "Kool-Aid." The defendant gave another statement to the police at 11:25 p.m. In his second statement he told police that he and the other three men waited in Beverly Drakeford's house for over four hours but that he was in the bathroom when Beverly returned home. According to his second statement, the defendant heard a gunshot but "did not see who did the shooting." He told police that he and Jay did not want to leave with Gillie and Loopo but "they had a gun waving it at us."

On 7 November 1994, the defendant was indicted on one count of first degree murder, one count of felonious breaking and entering, one count of felonious larceny, one count of possession of stolen goods, one count of trafficking by possession of Schedule II-cocaine, one count of possession with intent to sell and deliver Schedule II-cocaine, and one count of felonious possession of cocaine. On 1

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February 1995, the State gave notice that it planned to prosecute the first degree murder charge as a non-capital felony. The defendant was tried at the 29 January 1996 criminal session of Durham County Superior Court, Judge Orlando F. Hudson presiding. The trial court dismissed the charge of possession of stolen goods at the close of the State's evidence. The defendant offered no evidence at trial. The jury convicted the defendant of non-capital first degree murder, felonious breaking and entering, trafficking in cocaine by possession, and possession of cocaine with intent to sell and deliver. On 7 February 1996, the trial judge sentenced the defendant to life imprisonment without parole on the charges of first degree murder and felonious breaking and entering, which merged with the murder charge for sentencing, and 12 to 15 months imprisonment to be served consecutively on the combined charges of trafficking in cocaine by possession and possession of cocaine with intent to sell and deliver. The defendant appealed.

Attorney General Michael F. Easley, by Assistant Attorney General Marilyn R. Mudge, for the State.

Brian Michael Aus for the defendant-appellant.

EAGLES, Judge.

[1] The defendant argues that the trial court erred in admitting the statement of Roneka Jackson. First, the defendant contends that the trial court erred in admitting the hearsay testimony of Roneka Jackson "pursuant to N.C.G.S. §8C-1, Rule 804(b)5," which was in the form of an out-of-court recorded oral statement given to a police investigator. The defendant argues that the statement lacks the inherent trustworthiness necessary for admission under Rule 804(b)(5), and therefore admission of the statement violated defendant's constitutional right to confront a witness, based on the Sixth Amendment of the United States Constitution and Article I, § 23 of the North Carolina Constitution.

Rule 804(b)(5) provides:

(b) *Hearsay Exceptions.*—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(5) *Other Exceptions.*—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that, (A) the statement is offered as evidence of a material fact;

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(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

N.C.G.S. 8C-1, Rule 804(b)(5) (1992).

To admit hearsay testimony under Rule 804(b)(5), the trial court must first find that the declarant is unavailable. *State v. Peterson*, 337 N.C. 384, 391, 446 S.E.2d 43, 48 (1994). Roneka Jackson's unavailability was firmly established by Investigator Early's testimony that Roneka Jackson was deceased at the time of trial. After confirming the witness's unavailability, the trial court must undertake a six-step inquiry to determine the admissibility of the unavailable declarant's statement. *Id.* The trial court must determine:

- (1) Whether the proponent of the hearsay provided proper notice to the adverse party of his intent to offer it and its particulars;
- (2) That the statement is not covered by any of the exceptions listed in Rule 804(b)(1)-(4);
- (3) That the statement possesses 'equivalent circumstantial guarantees of trustworthiness';
- (4) That the proffered statement is offered as evidence of a material fact;
- (5) Whether the hearsay is 'more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable means'; and
- (6) Whether 'the general purpose of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.'

State v. Peterson, 337 N.C. at 391-92, 446 S.E.2d at 48 (quoting *State v. Triplett*, 316 N.C. 1, 9, 340 S.E.2d 736, 741 (1986)). To satisfy the two-prong constitutional test of necessity and trustworthiness for the admission of hearsay under the confrontation clause, "the trial court is required to make both findings of fact and conclusions of law on the issues of trustworthiness and probativeness." *State v. Peterson*, 337 N.C. at 392, 446 S.E.2d at 48. The ruling of the trial judge will not be disturbed unless the findings of fact are not supported by competent evidence or the law is erroneously applied. *Id.*

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Here, the defendant challenges the trial court's determination that Roneka Jackson's statement "is trustworthy" and admissible into evidence under Rule 804(b)(5). Because Rule 804(b)(5) is a residual hearsay exception, "it does not inherently possess indicia of reliability." *Id.*; *Idaho v. Wright*, 497 U.S. 805, 817, 111 L.Ed.2d 638, 653-54 (1990). "However, a statement which falls under the residual hearsay exception can meet Confrontation Clause standards if it is supported by particularized guarantees of trustworthiness based on the totality of the circumstances surrounding the making of the statement." *State v. Peterson*, 337 N.C. at 392, 446 S.E.2d at 49. The trial court should consider four factors in determining whether a hearsay statement possesses the required guarantees of trustworthiness; "(1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross examination." *State v. Triplett*, 316 N.C. 1, 10-11, 340 S.E.2d 736, 742 (1986).

Here, the trial court found that Roneka Jackson's recorded oral statement was trustworthy. The trial court's findings are well supported by the evidence. Roneka Jackson told Investigator Early about the particulars of a plan to rob and kill Beverly Drakeford and her boyfriend "Kool-Aid." According to Ms. Jackson, Loopo, Gillie, Jay and the defendant discussed this plan while at her apartment in early October. She was Loopo's former girlfriend and Loopo, Jay and the defendant lived in her apartment. The defendant admits to having been at Ms. Jackson's apartment prior to the murder and admits to planning to return to her apartment after the murder. Ms. Jackson had personal knowledge of the plan to rob and kill Beverly Drakeford. Furthermore, Ms. Jackson gave her statement to police while she was in custody on unrelated drug charges. It is reasonable for the court to infer that Ms. Jackson was motivated by her predicament to speak the truth. Also, although Ms. Jackson remained in police custody for "several months" following her statement, she never recanted or altered her March 1995 statement.

In determining whether a statement is trustworthy, courts have also considered "the degree to which the proffered testimony has elements of enumerated exceptions to the hearsay rule." *State v. Nichols*, 321 N.C. 616, 625, 365 S.E.2d 561, 567 (1988). In her statement, Ms. Jackson admitted that she and Beverly Drakeford "use to go to New York to pick up drugs and bring them back to Durham for

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this Jamaican who was her boyfriend . . . Kool-Aid.” Ms. Jackson’s admission to police that she participated in illegal drug trafficking provided the indicia of reliability underlying the declaration against penal interest exception of Rule 804(b)(3). “[W]hen a statement nearly fits an enumerated exception it has a degree of circumstantial trustworthiness which is relevant to the ultimate determination the trial court must make.” *Id.*

The trial court should not rely on corroborating evidence to support a hearsay statement’s particularized guarantee of trustworthiness. *State v. Tyler*, 346 N.C. 187, 485 S.E.2d 599 (1997). Findings of fact detailing corroborative evidence cannot be “relied upon in finding the circumstantial guarantees of trustworthiness required in order to protect the defendant’s rights under the Confrontation Clause of the United States Constitution.” *Id.* Here, as in *Tyler*, the trial court erred in detailing corroborating evidence in its findings of fact, but did not err in concluding that Ms. Jackson’s statement was inherently trustworthy. This conclusion of law, which is fully reviewable on appeal, is supported by the evidence.

Furthermore, to obtain reversal based on any error in the trial court’s ruling, the defendant must show prejudicial error. *State v. Brown*, 101 N.C. App. 71, 80, 398 S.E.2d 905, 910 (1990). The test for prejudicial error is “whether there is a reasonable possibility that a different result would have been reached at trial had the error not been committed.” *Id.* The defendant has not shown any prejudice caused by the admission of Ms. Jackson’s statement. The defendant’s own statement to police established that he accompanied Loopo, Gillie, and Jay to Beverly Drakeford’s home and waited for “several hours” until she returned. The defendant also told police that he was in the house when Beverly was shot and that he fled with Loopo, Gillie, and Jay in Beverly Drakeford’s Toyota Cressida. Officer Irving testified that he apprehended the defendant as defendant and Loopo were climbing over a fence to escape police. The defendant’s participation in the robbery and murder of Beverly Drakeford was established by other evidence. Defendant’s assignment of error is overruled.

[2] The defendant next contends that Ms. Jackson’s statement contained the hearsay statements of two co-defendants which do not fall under any recognized exception to the hearsay rule. Ms. Jackson’s statement contains several statements attributed to Loopo and Gillie; “he would have to kill whoever that was in the house because he (Loopo) said he didn’t want to have no witnesses or none of that,” and

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"Gillie was saying it 'cause at first, they was trying to get her coming off the highway . . . [t]hat's what was said . . . [b]ut then they was saying they was going to get her coming off the highway. . . ." Rule 805 provides that "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule. . . ." N.C.R. Evid. Rule 805 (1992). Rule 805 precludes the admission of statements within admissible hearsay statements that do not qualify independently for admission into evidence. The Rule 805 exclusion requirement does not apply when the second layer of statements are not hearsay.

The State argues that the statements of Loopo and Gillie contained in Ms. Jackson's statement were not offered for a hearsay purpose. According to the State, these statements were offered to establish the existence of a conversation between Loopo, Gillie, Jay and the defendant planning the robbery and murder of Beverly Drakeford. "If a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay." 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 141 (3d ed. 1988). Statements made by co-defendants offered to establish the defendant's participation in the planning of a crime are not offered for the truth of the matter asserted. *See e.g., State v. Allen*, 57 N.C. App. 256, 259, 291 S.E.2d 341, 343 (1982). The trial court did not err in admitting into evidence Ms. Jackson's complete statement, including the admissions of Loopo and Gillie. This assignment of error is overruled.

[3] The defendant next contends that the trial court erred in precluding admission of an exculpatory portion of Ms. Jackson's statement. The following portion of Ms. Jackson's statement was not presented to the jury:

[T]hese two, Click-Click (the defendant) and Jay, they were like scary. They ain't really wanted to do it but the only reason why they did it because Gillie, he like a bully and he was bigger than them. So he, like I don't know if he made them do it or not cause I wasn't there. . . .

The trial court denied the defendant's request to admit this portion of Ms. Jackson's statement because "ultimately it is an opinion that she had (which) she didn't have any legal basis to give."

Rule 701 limits opinion testimony by lay witnesses to "those opinions or inferences which are (a) rationally based on the perception of

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the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C.R. Evid. Rule 701 (1992). Although a lay witness may be allowed to testify as to his opinion of “the emotions (a person) displayed on a given occasion,” a lay witness “may not give his opinion of another person’s intention on a particular occasion.” 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence*, § 129 (3d ed. 1988). The omitted portion of Ms. Jackson’s statement is not a description of the defendant’s emotional response to the plan to kill Beverly Drakeford, but a statement of her opinion that the defendant may not have originally intended to participate in the plan. The trial court did not err in denying the defendant’s request to admit this portion of Ms. Jackson’s statement. Furthermore, other evidence admitted at the defendant’s trial, including the defendant’s own statement admitting his participation in the crime, establish the defendant’s willing participation in the plan to rob and kill Beverly Drakeford.

After a careful review of the record, we conclude that the defendant received a trial free of any prejudicial error.

No error.

Judges WALKER and MARTIN, Mark D., concur.

RODNEY L. PURSER, AND WIFE, CAROL F. PURSER, PLAINTIFFS v. MECKLENBURG COUNTY, NORTH CAROLINA, H. PARKS HELMS, CHAIRMAN AND MEMBER OF THE BOARD OF COUNTY COMMISSIONERS OF MECKLENBURG COUNTY, NORTH CAROLINA, AND DOUG W. BOOTH, EDNA CHIRICO, PATSY KINSEY, LLOYD SCHER, ANN SCHRADER, AND JAMES (JIM) F. RICHARDSON, MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS OF MECKLENBURG COUNTY NORTH CAROLINA, AND ANDY THOMAS DULIN, DEFENDANTS

No. COA96-1357

(Filed 5 August 1997)

Zoning § 94 (NCI4th)— spot rezoning—reasonable basis

A county board of commissioners made a clear showing of a reasonable basis for the spot zoning of a 14.9 acre tract of land to allow a neighborhood convenience center where the trial court found that the site plan for the property met or exceeded all requirements of the county’s district plan regarding size, density,

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buffers, traffic flow, and distance from other centers; the existing district plan provided for a neighborhood mixed use center one-half mile from the property, but such a project depended upon the construction of two roads 11 to 20 years in the future; and development of the neighborhood convenience center would benefit the surrounding community by providing daily goods and services while eliminating lengthy trips and lessening the burden on other streets.

Appeal by plaintiffs from judgment entered 18 July 1996 by Judge Charles C. Lamm, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 June 1997.

Cecil M. Curtis, P.A., by Cecil M. Curtis, for plaintiffs-appellants.

Ruff, Bond, Cobb, Wade & McNair, L.L.P., by James O. Cobb and Stephen D. Koehler, for all defendants-appellees except Andy Thomas Dulin.

Perry, Patrick, Farmer & Michaux, P.A., by Bailey Patrick, Jr., Roy H. Michaux, Jr. and John H. Carmichael, for defendant-appellee Andy Thomas Dulin.

WALKER, Judge.

In November 1985, the Mecklenburg County Board of Commissioners (the Board) and the Charlotte City Council (the City Council) adopted the 2005 Generalized Land Plan which divided Mecklenburg County into seven planning districts. Additionally, the General Development Policies District Plan (GDP) describing community issues, goals, objectives, policies and strategies of the seven districts was jointly adopted on 22 May 1990.

The GDP provides for several types of Mixed-Use and Commercial Centers to be placed throughout Mecklenburg County so as to organize and give structure to the overall land use pattern of the County.

The smallest type of center described in the GDP is the Neighborhood Convenience Center, the purpose of which is the sale of convenience goods to meet the daily needs of the immediate residential neighborhood, including food, drugs, sundries, laundry, cleaners, barbers and shoe repair shops. These Centers would contain a maximum of 70,000 square feet of retail space. The seven individual

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district plans identify over 70 locations where the Centers either exist or were appropriate for future development.

The GDP also describes a larger Neighborhood Mixed-Use Center. This type of Center contains up to 250,000 square feet of non-residential development which includes services such as a supermarket, small shops, restaurants, low-rise medical centers and banks. The GDP acknowledges that "planning is a dynamic process that necessitates being flexible and adapting to changes," and it establishes four separate processes for initiating formal amendments to a district plan. One such method allows a petitioner seeking rezoning that conflicts with a district plan to obtain an amendment to the plan as part of the general rezoning process. If the rezoning petition is approved by the Board, the relevant district plan is amended simultaneously with the zoning decision.

On 6 July 1993, defendant Andy Dulin filed a petition to rezone a 14.9 acre portion of his property at the southwest corner of the intersection formed by Plaza Road Extension and Hood Road from the existing R-3 to B-1 (CD) Parallel Conditional Use District to allow for a Neighborhood Convenience Center to serve this section of the East District of the County.

The East District Plan (EDP), adopted by the Board in September 1990, identified proposed development for three Neighborhood Mixed-Use Centers. One of these centers had as its proposed location the intersection of Plaza Road Extension and the East Circumferential Roadway (a proposed beltway for the County). This location was near Dulin's property; however, before a Mixed-Use Center could be built there, a portion of Plaza Road Extension would have to be relocated and the circumferential roadway would have to be constructed.

After the filing of Dulin's petition and prior to a public hearing thereon, the Charlotte Mecklenburg Planning Commission (Planning Commission) staff prepared a Pre-Hearing Staff Analysis on the petition. On 13 September 1993, the Board and the Zoning Committee of the Planning Commission held a public hearing on Dulin's petition. Walter Fields, Land Development Manager of the County, made a presentation regarding the petition, the property and the land use and zoning in the surrounding area. Fields also described in detail the site plan and other outstanding issues attendant to the site plan. Defendant Dulin's representative, Fred Bryant, spoke in favor of the rezoning and six people spoke in opposition. After some discussion,

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the Board deferred its decision until after a recommendation was received from the Planning Commission.

The Planning Commission is a fourteen member citizen board made up of seven members appointed by the Board, five members appointed by the City Council, and two members appointed by Charlotte's mayor. The members are divided into two standing committees, the Planning Committee and the Zoning Committee. The Planning Committee deals with planning matters, mandatory referrals, adoptions of district plans, small-area plans, special project plans and quarter plans. The Zoning Committee deals with the ongoing administration of the rezoning process.

On 9 November 1993, the Planning Committee considered the EDP plan amendment requested by Dulin and voted unanimously to recommend denial of the proposal. The Zoning Committee then met on 20 December 1993 and voted unanimously to recommend that the petition be approved. Among the reasons cited in the Zoning Committee's written recommendation in support of the petition was that the Dulin property is more suitable for development of a shopping center in the near future than the designated site due to good access, superior topography and generous buffers and green space. These written recommendations were sent to the Board.

On 18 January 1994, the Board again considered the petition and voted five to one in favor of adoption of the resolution approving a change in zoning in accordance with the petition. As a result of the Board's decision, a larger Neighborhood Mixed-Use Center originally proposed for a designated site less than 3,000 feet from the Dulin property was replaced in favor of a smaller Neighborhood Convenience Center.

On 17 October 1994, plaintiffs owned property located in the southeast quadrant of Hood Road and Plaza Road Extension. They filed a complaint against Mecklenburg County and members of the Board seeking a judgment declaring the 18 January 1994 amendment to the zoning ordinance to be unlawful, invalid and void. Defendant Dulin was added as a party defendant on 2 November 1994.

On 29 February 1996, the trial court entered partial summary judgment in favor of the plaintiffs, ruling that the rezoning in question was "spot zoning" and that defendant Mecklenburg County had the burden of making a "clear showing of a reasonable basis for the rezoning." At the 8 July 1996 civil term, the case was tried without a

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jury. The trial court made findings and concluded that “even though the rezoning of the Dulin property constituted spot zoning, it was of the legal variety and therefore not invalid,” the County has made a clear showing of a reasonable basis in rezoning the property and its action was neither arbitrary nor discriminatory. The plaintiffs were taxed with court costs including an expert witness fee for Fred Bryant in the amount of \$1,000.00.

Plaintiffs first argue that the trial court committed prejudicial error in admitting evidence which was not reviewed by the Board in making its determination to rezone Dulin's property. Specifically, plaintiffs argue that the trial court should not have admitted (1) the testimony of Walter Fields regarding a map depicting the location of Neighborhood Convenience Centers in the County and (2) other exhibits which plaintiffs claim were created after the Board's decision. These exhibits include: District plans other than the EDP; a map of the County depicting the locations of Neighborhood Convenience Centers in the County; photographs of existing Neighborhood Convenience Centers in the County; photographs of Dulin's property; and photographs of the site originally designated for the Neighborhood Mixed-Use Center in the EDP.

Plaintiffs agreed it would be appropriate for the trial court to consider any evidence that came before the Board, the Planning Committee and the Zoning Committee, as well as the GDP and the EDP. In ruling on plaintiffs' objections, the trial court determined that evidence relevant to the GDP would be admitted. After reviewing the record, we conclude that the evidence which plaintiffs find objectionable merely illustrated the underlying planning and policy considerations reflected in the GDP and the EDP and how those plans have been implemented in practice. Therefore, the testimonies of Fields and Bryant, along with the exhibits, did not constitute “evidence created after the rezoning process.” The plaintiffs have failed to show how the admission of such evidence was so prejudicial that a different result likely would have been reached had this evidence been excluded. *Board of Education v. Lamm*, 276 N.C. 487, 492, 173 S.E.2d 281, 284 (1970).

Next, the plaintiffs contend that the trial court erred in concluding that the County has made a clear showing of a reasonable basis for rezoning Dulin's property as required by our Supreme Court's ruling in *Chrismon v. Guilford County*, 322 N.C. 611, 370 S.E.2d 579 (1988). There, the Court examined the validity of the rezoning of 8.57

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acres of land belonging to defendant Bruce Clapp (Clapp). In 1948, Clapp started operating a business adjacent to his home in rural Guilford County. The business first consisted of "buying, drying, storing, and selling grain" and second of "selling and distributing lime, fertilizer, pesticides, and other agricultural chemicals." *Id.* at 613, 370 S.E.2d at 581.

In 1964, Guilford County adopted a comprehensive zoning ordinance which zoned Clapp's property as "A-1 Agricultural." Under A-1 Agricultural, the grain drying and storing portion of Clapp's business was a permitted use. The remaining portion of Clapp's business, i.e. the sale and distribution of fertilizer and other agricultural chemicals, was not permitted uses; however, because these uses pre-existed the ordinance, Clapp was allowed to continue them as long as they were not expanded. *Id.* at 614, 370 S.E.2d at 581.

In 1980, Clapp expanded his business and applied to have his property rezoned from A-1 Agricultural to a Conditional Use Industrial District, which would allow for his expanded agricultural chemical operation. On 20 December 1982, Guilford County approved the conditional use permit application. *Id.* at 615, 370 S.E.2d at 582.

The Chrismons were adjoining property owners and they filed suit seeking a declaratory judgment that the rezoning amendment was unlawful and void. The Court held that in any case involving spot zoning two questions must be addressed by the finder of fact: "(1) did the zoning activity in the case constitute spot zoning as our courts have defined that term; and (2) if so, did the zoning authority make a clear showing of a reasonable basis for the zoning." *Id.* at 627, 370 S.E.2d at 588.

In addressing the first question, the Court noted "spot zoning" has been defined as follows:

A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected, is called "spot zoning."

Id. at 627, 370 S.E.2d at 588-89 (quoting *Blades v. City of Raleigh*, 280 N.C. 531, 549, 187 S.E.2d 35, 45 (1972)).

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The Court next noted that “a judicial determination as to the existence or nonexistence of a sufficient reasonable basis in the context of spot zoning is, and must be, the product of complex factors.” *Id.* at 628, 370 S.E.2d at 589. The Court further noted that “[t]he possible ‘factors’ are numerous and flexible, and they exist to provide guidelines for a judicial balancing of interests.” *Id.* Among the factors the *Chrismon* court found relevant are:

- (1) the size of the tract;
- (2) the compatibility of the disputed zoning action with an existing comprehensive plan;
- (3) the benefits and detriments resulting from the zoning action for the owner of the newly zoned property, his neighbors, and the surrounding community; and
- (4) the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts.

Id.

In view of the holding in *Chrismon*, we must determine whether the trial court properly concluded that the Board made a clear showing of a reasonable basis for rezoning Dulin’s property.

In its order, the trial court set forth certain conclusions which more accurately should have been included in its findings since they support its ultimate conclusion that the County made a clear showing of a reasonable basis for the rezoning of Dulin’s property. However, the mislabeling of these findings is not detrimental to the outcome of the decision. *See Cauble v. City of Asheville*, 66 N.C. App. 537, 545, 311 S.E.2d 889, 894 (1984).

In its order, the trial court analyzed each of the factors enumerated in *Chrismon*. First, the court found that the rezoned property was a 14.9 acre tract of land located at the intersection of Plaza Road Extension and Hood Road. Further, the conditional site plan for the Neighborhood Convenience Center proposed for the property met or exceeded all the requirements set forth in the GDP and the EDP regarding size, density, buffers, traffic flow, and distance from other centers. The court then concluded that the Dulin property was suitable and beneficial due to the low density of the site plan and the generous buffers between the area to be developed and surrounding residential property.

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The trial court next examined the compatibility of the zoning change with the County's existing comprehensive land use plan. The court found that the existing EDP provided for a Neighborhood Mixed-Use Center at a location one-half mile west of Dulin's property, which would be at the intersection of a proposed relocated portion of the Plaza Road Extension and a proposed Eastern Circumferential Road. However, the court then found that neither of these roads were in existence and that construction of these roads was in a time frame of 11 to 20 years from 1990. Thus, the time and expense involved in the construction of the roads made it unlikely that the Neighborhood Mixed-Use Center would be suitable for development within the foreseeable future. The trial court then concluded that the use of the Dulin property as a Neighborhood Convenience Center was compatible with the policies expressed in the GDP and the District Plans in that the Center had been designed to be an integral part of the entire residential community in which it would be located.

Next, the trial court made findings with regard to any benefits and detriments to Dulin, his neighbors and the surrounding neighborhood. The court found that the philosophy behind the Neighborhood Convenience Center, as set out in the GDP, and its placement within residential areas, was to allow those who live nearby to walk or travel very short distances for goods to meet their daily needs. Thus, the trial court concluded development of the Neighborhood Convenience Center would benefit the surrounding community in that it would provide daily goods and services while eliminating lengthy trips thereby lessening the burden on other streets and roads.

With regard to the detriments to the surrounding community, the court noted that a number of concerns were expressed, but that the Dulin site plan and the manner in which it is to be constructed adequately addressed those concerns.

Finally, the trial court made findings concerning the last *Chrismon* factor, the relationship between the proposed use of the rezoned property and the current uses of the adjacent property. Here, the court found that while the rezoning of Dulin's property to B-1 Conditional Use would allow a different use from that of the adjacent property, such use was restricted to a Neighborhood Convenience Center. Further, it found the development of the Center was governed by a conditional use site plan that was designed to integrate the Center into the neighborhood and insure that it would be in harmony with the existing and proposed residential uses on the surrounding

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property. Therefore, the court concluded the relevant rezoning was compatible with the existing and proposed residential uses in the surrounding neighborhood.

We conclude that the trial court's findings were based on competent evidence from which it properly concluded that the Board had made a clear showing of a reasonable basis for the rezoning of Dulin's property. Thus, the plaintiffs' assignment of error on this issue is overruled.

We have considered plaintiffs' remaining assignments of error including the trial court's order taxing plaintiffs with the expert witness fee for Fred Bryant in the amount of \$1,000.00 and find them to be without merit. As such, the trial court's order is

Affirmed.

Judges GREENE and JOHN concur.

A. RON VIRMANI, M.D., PLAINTIFF v. PRESBYTERIAN HEALTH SERVICES CORP.,
DEFENDANT

No. COA96-1263

(Filed 5 August 1997)

**1. Hospitals and Medical Facilities or Institutions § 39
(NCI4th)— physician's staff privileges—bylaws as part of
contract**

Hospital bylaws governing the suspension and termination of a physician's staff privileges were an integral part of the physician's contract with the hospital, even though the hospital was required by statute to have such bylaws and the physician was required by statute to comply with the bylaws, where the physician agreed to be bound by the bylaws as a condition of receiving staff privileges, and pursuant to this agreement the physician became a member of the medical staff at the hospital and treated his patients in the hospital.

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2. Hospitals and Medical Facilities or Institutions § 39 (NCI4th)— physician's staff privileges—termination—failure to follow bylaws—hospital not immune under bylaws

A hospital bylaw providing that no representative of the hospital or its staff will be liable for damages or any other relief for any action, statement or recommendation within the scope of his or her peer review duties did not grant immunity to the hospital for breach of contract by failing to follow its bylaws in terminating a physician's hospital staff privileges.

3. Hospitals and Medical Facilities or Institutions § 39 (NCI4th)— physician's staff privileges—termination—failure to follow bylaws—different peer review personnel—no authority by court

Where the trial court found that defendant hospital did not follow the peer review procedure provided by its bylaws in terminating plaintiff physician's staff privileges, the court did not have the authority to require the hospital to conduct a new peer review process utilizing personnel different from that called for in the bylaws.

4. Hospitals and Medical Facilities or Institutions § 39 (NCI4th)— termination of staff privileges—federal statute—attorney fees not warranted

Defendant hospital was not entitled to attorney fees under the Health Care Quality Improvement Act in an action arising from the termination of plaintiff physician's hospital staff privileges where plaintiff neither alleged nor tried to prove that the hospital violated any provisions of the Act.

Appeal by defendant from order dated 30 July 1996 by Judge Marcus L. Johnson in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 May 1997.

Underwood, Kinsey, Warren & Tucker, by William L. Sitton, Jr., for plaintiff-appellee.

Johnston, Taylor, Allison & Hord, by Patrick E. Kelly, and Greg C. Ahlum, for defendant-appellant.

GREENE, Judge.

Presbyterian Health Services Corp. (Presbyterian) appeals an order granting A. Ron Virmani's, M.D., (Virmani) request for an

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injunction directing compliance with certain Medical Staff Bylaws (Bylaws).

Virmani filed suit against Presbyterian (which operates two hospitals in the Charlotte area) claiming a breach of contract when his medical staff privileges (in those hospitals operated by Presbyterian) were suspended without the benefit of an opportunity to respond (at an early stage of the investigation) to allegations regarding his competence to practice medicine in hospitals operated by Presbyterian. Specifically Virmani claims the investigation was conducted pursuant to section 8.0-2 of the Bylaws and that section (entitled Peer Review Referral) requires that he, prior to any action by the Committee, be given notice of allegations and an opportunity to be heard before the Committee. Virmani seeks actual and consequential damages, attorneys' fees, and an injunction to prevent Presbyterian from suspending his privileges except in accordance with the Bylaws.

The matter came on for hearing before the trial court pursuant to competing motions for summary judgment. The evidence presented at the hearings on these motions reveals that Virmani was board-certified in obstetrics and gynecology and maintained a solo practice in Matthews, North Carolina, at the time he applied for and was granted staff privileges at one of the hospitals operated by Presbyterian. The Bylaws, a copy of which he received upon his application for privileges, provide that the granting of privileges is conditioned upon the applicant's agreement to be bound by the terms of the Bylaws. Bylaws § 6.2-2(a). As a member of the medical staff Virmani is granted the privilege to "formulate . . . and recommend" amendments to the Bylaws. Bylaws § 16.1.

Fourteen months after receiving his privileges Virmani, while performing a pelvic laparoscopy in the hospital, punctured a patient's iliac artery. Two weeks later, Simon V. Ward, M.D., (Ward), the Chairman of the OB/GYN Department, met with Virmani and informed him that Paul F. Betzold, (Betzold) President and CEO of Presbyterian, requested that an inquiry of the incident be conducted. Ward sought the assistance of the standing OB/GYN Peer Review Committee (Committee) to conduct the inquiry. During the next five months the Committee examined 102 of Virmani's cases and found 24 of them to be problematic in one of three areas: procedures performed without indication, documentation discrepancies, and medical management issues. At no time during the inquiry was Virmani questioned or given an opportunity to respond with regard to his treatment of the 102 cases investigated by the Committee. The

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Committee, upon completion of its investigation, made its report to Ronald L. Brown, M.D., (Brown) the new OB/GYN chairman. Several months later Betzold notified Virmani that after reviewing the Committee's report he was suspending his "clinical privileges . . . at the Presbyterian Hospitals," pending review by the Medical Board. Virmani received permission to address the Medical Board to present reasons why his privileges should not be suspended. The Medical Board upheld Virmani's summary suspension. Virmani then made a timely request for a *de novo* hearing before a three-person Hearing Committee as provided by Article IX of the Bylaws. Three months later the *de novo* hearing was conducted at which time Virmani was given full due process rights, including the right to be present, the right to call and examine witnesses, and to cross examine witnesses. The Hearing Committee voted to affirm the suspension.

Upon review of the Hearing Committee's report, the Medical Board unanimously voted to terminate Virmani's staff privileges and submitted its decision to the Board of Trustees of the Hospital for approval. Virmani requested an appeal before the Board of Trustees which was granted. The Board of Trustees unanimously upheld the decision to terminate Virmani's physician privileges.

The trial court granted Presbyterian's motion for summary judgment on Virmani's claim for monetary damages and granted Virmani's motion for summary judgment seeking injunctive relief. The order directed Presbyterian to conduct a new Peer Review hearing allowing Virmani to respond to written queries from the Committee, prior to its recommendation to the department chairman. The order further provided that the "members of the . . . Committee are to be different from the prior physicians who served on that Committee, and they are not to be OB-GYN physicians who maintain an office within the town limits of Matthews, North Carolina, or part of a medical group that maintains such an office." The order directed that there must be a "substitute" selected to act as chairman of the OB/GYN department for the purposes of receiving and acting on the recommendations of the Committee. The trial court denied Presbyterian's claim that it should be awarded attorney's fees under the Health Care Quality Improvement Act (Act), 42 U.S.C. § 11113.

The issues are (I) whether the termination of Virmani's privileges was conducted pursuant to section 8.0-2 of the Bylaws; and if so, (II) whether the provisions of section 8.0-2 were violated; and if so, (III) whether a breach of the Bylaws gives rise to a claim for breach of

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contract; and if so, (IV) whether the Bylaws provide Presbyterian immunity from damages and injunctive relief; and if not, (V) whether the trial court can style injunctive relief so as to set the membership of the Committee; and (VI) whether Presbyterian is entitled to attorneys' fees.

I

Presbyterian argues that Virmani's privileges were not suspended pursuant to section 8.0-2¹ of the Bylaws but instead pursuant to section 8.2² and the latter section allows for summary suspension without the benefit of any prior notice or hearing. We disagree. Although it does appear (an issue we need not decide in this case) that section 8.2 allows for the summary suspension of the privileges of any physician whose conduct "requires that immediate action be taken to protect the life of any patient(s)," in this case the issue of Virmani's

1. § 8.0-2 Peer Review Referral: Whenever a substantial question regarding quality of patient care, ethics or other definable Medical Staff responsibility is raised concerning an individual Staff member, and the peer review member(s) is unsatisfied with the individual's response to their written query, a referral of the issues shall be made in writing, to the chairperson of the department in which the Staff member serves.

2. § 8.2 Summary Suspension:

8.2-1 Criteria and Initiation: Whenever a physician's/oral surgeon's conduct requires that immediate action be taken to protect the life of any patient(s) or to reduce the substantial likelihood of immediate injury or damage to the health or safety of any patient, employee or other person present in the Hospital, either the (1) chair of department or his/her designee, (2) the President, or (3) the chief of Staff shall have the authority to summarily suspend the Staff membership status or all or any portion of the clinical privileges of such physician/oral surgeon.

Such summary suspension shall become effective immediately upon imposition, and the Hospital President shall promptly give special notice of the suspension to the physician/oral surgeon. In the event of any such suspension, the physician/oral surgeon's patients then in the Hospital whose treatment by such physician/oral surgeon is terminated by the summary suspension shall be assigned to another physician/oral surgeon by the department chairperson. The wishes of the patient shall be considered, where feasible, in choosing a substitute physician/oral surgeon.

8.2-2 Medical Board Action: As soon as possible after such summary suspension, a meeting of the Medical Board shall be convened to review and consider the action taken. The Medical Board may modify, continue or terminate the terms of the summary suspension.

8.2-3 Procedural Rights: Unless the Medical Board immediately terminates the suspension and ceases all further corrective action, the physician/oral surgeon shall be entitled to the procedural rights as provided in Article IX, and the matter shall be processed in accordance with the provisions of the Fair Hearing Plan.

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suspension was directed to the Committee which was asked to make a recommendation to the department chair. Thus, although the suspension may have qualified for a summary suspension under section 8.2-1, it was not handled in that manner and instead was treated as a peer review referral under section 8.0-2, with the Committee making a recommendation to the department chair who in turn submitted the recommendation to the President, who then suspended Virmani.

II

Presbyterian makes no argument that a section 8.0-2 hearing does not require a written query from the Committee to Virmani, prior to making a recommendation to the department chair. Indeed section 8.0-2 is specific in permitting referrals to the department chair only after providing the physician under investigation an opportunity to respond to written queries from the Committee.

III

[1] Presbyterian argues that even if the Bylaws were not followed there does not arise any claim by Virmani for breach of contract. Specifically it argues that because it is required by statute to have bylaws governing the suspension and termination of a physician's privilege to practice in hospitals, *see* N.C.G.S. § 131E-85(a) (1994), and because Virmani was required by statute to comply with the Bylaws, N.C.G.S. § 131E-85(d), "there was no mutual exchange of consideration" and therefore no contract.

We acknowledge the general rule that the promise to perform an act which the promisor is already bound to perform cannot constitute consideration to support an enforceable contract. *Warzynski v. Empire Comfort Sys.*, 102 N.C. App. 222, 231, 401 S.E.2d 801, 806 (1991). Thus the mere enactment of a set of bylaws pursuant to the statute is a preexisting duty and cannot itself constitute consideration for the formation of a contract. When, however, a hospital offers to extend a particular physician the privilege to practice medicine in that hospital it goes beyond its statutory obligation. *See* N.C.G.S. § 131E-85(a) (granting of privilege to physician not mandated and to be determined by hospital on a "non-discriminatory basis"). If the offer is accepted by the physician, the physician receives the benefit of being able to treat his patients in the hospital and the hospital receives the benefit of providing care to the physician's patients. If the privilege is offered and accepted, each confers a benefit on the other and these benefits constitute sufficient and legal consideration

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for the performance of the agreement. *See* 17A Am. Jur. 2d *Contracts* § 113, at 129 (1991) (consideration defined to include any “benefit accruing to one party”). If the offer includes a condition that the physician be bound by certain bylaws promulgated by the hospital and the physician accepts the offer, those bylaws become a part of the contract, as there is mutual assent to be bound by the bylaws. *See* 17A Am. Jur. 2d *Contracts* § 26, at 54 (mutual assent necessary for formation of contract); *see also* *Lewisburg Community Hosp., Inc. v. Alfredson*, 805 S.W.2d 756, 761 (Tenn. 1991) (medical staff member has a “contractual right to insist that the Hospital follow its bylaws”); *Lawler v. Eugene Wuesthoff Mem’l Hosp.*, 497 So. 2d 1261, 1264 (Fla. Dist. Ct. App. 1986) (hospital bylaws binding and enforceable contract between hospital and physicians privileged to practice in hospital); *St. John’s Hosp. Med. Staff v. St. John Reg’l Med. Ctr.*, 245 N.W.2d 472, 475 (S.D. 1976) (medical staff bylaws are an enforceable part of the contract between physician and hospital).

In this case Virmani applied for and was granted the privilege to practice medicine in the hospitals operated by Presbyterian. The application process was in accordance with the Bylaws³ as adopted by Presbyterian⁴ and Virmani agreed “to be bound by the terms” of the Bylaws in the event he was granted hospital privileges. Bylaws § 6.2-2(a). Pursuant to this agreement Virmani became a member of the medical staff at Presbyterian and treated his patients in its hospital. This evidence about which there is no genuine issue supports the determination that a valid and enforceable contract existed between Presbyterian and Virmani and that the Bylaws were an integral part of that contract.⁵

3. “Each application for appointment to the Staff shall be in writing, submitted on the prescribed form, and signed by the applicant. When a physician or oral surgeon requests an application form, he/she shall be given a copy of, or access to a copy of, these Bylaws, the Staff Rules & Regulations, the Hospital corporate Bylaws and summaries of other Hospital and Staff policies relating to clinical practice in the Hospital.” Bylaws § 6.2-1.

4. The preamble to the Bylaws indicates that the Bylaws were adopted by the Board of Trustees of Presbyterian. Any amendments to the Bylaws must be approved by the Board of Trustees. Bylaws § 16.1.

5. The issue of whether hospital bylaws are enforceable by a physician given hospital privileges is similar to the issue of whether employment manuals or policies are an enforceable part of an employment contract. “[U]nilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it.” *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 259, 335 S.E.2d 79, 83-84 (1985), *disc. rev. denied*, 315 N.C. 597, 341, S.E.2d 39 (1986). In this case the Bylaws were not unilateral (medical staff had responsibility to “formulate . . . and

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IV

[2] Presbyterian argues that even if Virmani is entitled to proceed on his breach of contract claim, that claim must nonetheless be dismissed because its Bylaws provide it immunity from this claim. We disagree. Section 14.4-1 of the Bylaws, the section relied on by Presbyterian, provides:

No representative of the Hospital or its Staff shall be liable to a Health Practitioner *for damages or other relief* for any action taken or statement or recommendation made within the scope of his/her duties as a representative, if such representative acts in good faith and without malice after a reasonable effort under the circumstances to ascertain the truthfulness of the facts and in the reasonable belief that the action, statement, or recommendation is warranted by such facts.

(Emphasis added). This Bylaw does not provide any immunity to Presbyterian. The plain and unambiguous language of the Bylaw provides immunity only to “representative[s]” or “Staff” of the hospitals operated by Presbyterian. Thus Presbyterian is not entitled to any immunity under the provisions of section 14.4-1.⁶

V

[3] Presbyterian argues that even if it is not immune from injunctive relief the particular relief fashioned by the trial court in this case is beyond its authority. It argues that requiring it to conduct a new peer review process utilizing personnel different from that called for in the Bylaws was error. We agree. “A court of equity cannot make a new contract for the parties . . . but must enforce the contract according to its terms or not at all.” 71 Am. Jur. 2d *Specific Performance* § 211, at 270; see *McLean v. Keith*, 236 N.C. 59, 71, 72 S.E.2d 44, 53 (1952). In this case the Bylaws are designed to provide for internal peer review, see Bylaws § 8.0, and the order of the trial court interfered with that process. Accordingly this portion of the order of the trial

recommend” Bylaws) and they were expressly included in the agreement to grant the privilege (physician had to agree to be bound by Bylaws as condition of receiving privilege).

6. We note that the trial court did grant Presbyterian’s motion for summary judgment on Virmani’s claim for monetary damages on the grounds that federal (42 U.S.C. § 11101-11152) and state statutes (N.C. Gen. Stat. 131E-95) immunized Presbyterian from monetary damages. Neither party has appealed from this ruling and therefore its correctness is not addressed.

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court must be reversed and on remand the new peer review process is to be conducted in accordance with the Bylaws and the personnel selected in a manner as determined by the medical staff of the hospital not inconsistent with the Bylaws.

VI

[4] The Act provides for the payment of attorneys' fees in defense of a frivolous or unreasonable suit brought against a defendant under the Act. 42 U.S.C. § 11113. The purpose of providing the costs of legal representation is to encourage professional peer review by limiting the possibility of unreasonable litigation expenses. *Smith v. Ricks*, 31 F.3d 1478, 1487 (9th Cir.), *cert. denied*, 514 U.S. —, 131 L. Ed. 2d 287 (1994).

Virmani has neither alleged nor tried to prove that Presbyterian violated the provisions of the Act. As such, Presbyterian's claim that it should be awarded attorneys' fees under the Act is unfounded. The trial court was correct, therefore, in ordering each party to pay its own costs, including attorneys' fees.

Affirmed in part, reversed in part and remanded.

Judges JOHN and WALKER concur.

ROBERT D. BRYANT, AND WIFE, BRUNHILDE S. BRYANT, PLAINTIFFS v. WILLIAM T. HOGARTH, FISHERIES DIRECTOR, DIVISION OF MARINE FISHERIES AND THE (NORTH CAROLINA) MARINE FISHERIES COMMISSION AND JONATHAN HOWES, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, AND NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, BY AND THROUGH ITS REGISTERED AGENT, RICHARD B. WHISNANT, DEFENDANTS

No. COA96-93

(Filed 5 August 1997)

1. Courts § 5 (NCI4th); Pleadings § 144 (NCI4th)— subject matter jurisdiction—failure to exhaust administrative remedies

An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction when the plaintiff has failed to exhaust its administrative remedies. N.C.G.S. § 1A-1, Rule 12(b)(1).

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2. Fish and Fisheries § 21 (NCI4th)— lands under navigable waters—public trust—franchise for shellfish

While the State holds title to lands under navigable waters in public trust for the use and benefit of all its citizens, the State may permit the exclusive use of such lands by private individuals, *i.e.*, a franchise, for specified purposes, such as shellfishing.

3. Fish and Fisheries § 21 (NCI4th)— franchise to cultivate shellfish—designation of area as PNA—prohibition of mechanical harvesting—not taking—judicial review—exhaustion of administrative remedies

The Marine Fishery Division's designation of a submerged area for which plaintiffs have a franchise to cultivate shellfish as a primary nursery area and the denial of a permit to harvest shellfish within the area by mechanical means did not constitute a taking under N.C.G.S. § 113-206(d) which was subject to judicial review under N.C.G.S. § 113-206(e) without resort to the administrative remedies of N.C.G.S. Ch. 150B. Furthermore, plaintiffs' complaint failed to state a claim for a compensable taking under N.C.G.S. § 113-206(e) where it alleged that their deed of purchase of the franchise was filed more than five years after the area was designated as a primary nursery area and administrative rules prohibiting the mechanical harvesting of shellfish within such an area were adopted.

4. Administrative Law and Procedure § 55 (NCI4th)— aggrieved parties—contested case

Plaintiffs who were denied permits by the Marine Fisheries Division to harvest shellfish mechanically in a tract of submerged land for which they have a shellfish franchise were "aggrieved parties" who could initiate a "contested case" with the Office of Administrative Hearings. N.C.G.S. § 150B-2(6).

5. Fish and Fisheries § 21 (NCI4th)— shellfish franchise—mechanical harvesting—permit denials—judicial review—failure to exhaust administrative remedies

The superior court did not have subject matter jurisdiction to review the Marine Fisheries Division's denial of plaintiffs' applications to allow mechanical harvesting of shellfish in submerged lands for which plaintiffs had a franchise to cultivate shellfish where plaintiffs failed to pursue administrative appeals of the denials of their applications and failed to plead futility or inadequacy as grounds for failing to pursue administrative

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review. Plaintiffs could not by separate action collaterally attack the denials of their permit applications by claiming that such denials constituted a taking of their franchise under N.C.G.S. § 113-206(d).

Appeal by plaintiffs from order entered 15 September 1995 by Judge James R. Strickland in Onslow County Superior Court. Heard in the Court of Appeals 8 October 1996.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C.R. Wheatly, III, for plaintiffs-appellants.

Attorney General Michael F. Easley, by Special Deputy Attorney General J. Allen Jernigan, and Assistant Attorney General David W. Berry, for defendants-appellees.

JOHN, Judge.

Plaintiffs appeal the trial court's order granting defendants' "motion to dismiss for lack of subject matter jurisdiction." The court determined plaintiffs "failed to exhaust the administrative remedies provided by the N.C. Administrative Procedure Act, N.C. Gen. Stat. § 150B-1 *et seq.*" We affirm the ruling of the trial court.

Relevant background information and procedural history are as follows. In 1969, Mrs. Garland W. Yopp (Yopp), plaintiffs' predecessor in title to the franchise to cultivate and harvest shellfish (the franchise) at issue herein, registered her claim pursuant to N.C.G.S. § 113-205 (1994) to the franchise applicable to approximately 38 acres of Onslow County submerged land (the tract) in Chadwick's Bay. Yopp's claim was based on grants issued to predecessors in title conferring a perpetual franchise for the purpose of raising and cultivating shellfish in the tract. 1887 N.C. Sess. Laws ch. 90, repealed by 1889 N.C. Sess. Laws ch. 298.

Subsequent to Yopp's application, the Marine Fisheries Commission (MFC) designated the waters of Chadwick's Bay a "Primary Nursery Area" (PNA) effective 1 November 1977. Former N.C. Admin. Code (NCAC) tit. 15 r. 3B.1405(m)(4), now codified as NCAC tit. 15A r. 3R.0103(13)(d) (April 1997). Prior to resolution of Yopp's claim but following the PNA designation, title to the franchise passed to plaintiffs by general warranty deed filed 25 August 1982.

Acting on Yopp's original claim, the Secretary of the North Carolina Department of Natural Resources and Community

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Development (now North Carolina Department of Environment, Health and Natural Resources (DEHNR)) notified plaintiffs by letter dated 18 June 1985 that the State officially recognized the franchise under G.S. § 113-205 as “a limited interest” *vis à vis* claims of other private claimants for the “purpose of cultivating shellfish.” Plaintiffs thus were acknowledged to hold an exclusive franchise to cultivate shellfish in the tract as against the State, but the latter reserved judgment as to the validity of plaintiffs’ claims *vis à vis* claimants other than the State.

The Secretary’s letter, while conceding plaintiffs’ title, also stated the tract had been designated a PNA and consequently that “the use of mechanical or other bottom-disturbing gear to harvest shellfish in the area [wa]s prohibited.” However, other means of harvesting, such as hand “tonging” and raking, were not precluded in such areas. PNA classifications were effected to protect juvenile populations of economically important seafood species, such as shrimp and finfish, in fragile estuarine areas from environmentally destructive bottom-disturbing fishing gear. *See* NCAC tit. 15A r. 3N.0101 and 3N.0104 (April 1997).

On four separate occasions between 1985 and 1992, plaintiffs sought a permit from the Marine Fisheries Division (MFD) of DEHNR to harvest shellfish mechanically in the tract. On each occasion, the request was denied based upon the PNA designation conferred by the predecessors of NCAC tit. 15A r. 3R.0103(13)(d) (April 1997), which prohibited mechanical harvesting in such areas. On none of the four occasions did plaintiffs pursue administrative appeal of denial of their application.

Plaintiffs filed the instant declaratory judgment and condemnation action 10 June 1993. Plaintiffs first sought a declaration that MFD lacked authority to prohibit mechanical harvesting in the tract. In their second claim, plaintiffs alleged that designation of the tract as a PNA and refusal to allow use of mechanical harvesting therein rendered their interest in the land worthless, and thus constituted a regulatory taking entitling them to compensation under N.C.G.S. § 113-206(e). Defendants filed answer which included a motion to dismiss for lack of subject matter jurisdiction pursuant to N.C.R. Civ. P. 12(b)(1) on grounds plaintiffs had failed to exhaust the administrative remedies provided in G.S. § 150B-1 *et seq.* Following a hearing, the trial court granted defendants’ motion in an order entered 15 September 1995. Plaintiffs filed timely notice of appeal, setting

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out the court's grant of defendants' motion as their sole assignment of error.

[1] A motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction may be raised at any time. *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 421, 248 S.E.2d 567, 571 (1978), *disc. review denied*, 296 N.C. 583, 254 S.E.2d 32 (1979). Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. *Harris v. Pembaur*, 84 N.C. App. 666, 667-68, 353 S.E.2d 673, 675 (1987). An action is properly dismissed under the Rule for lack of subject matter jurisdiction when the plaintiff has failed to exhaust its administrative remedies. *Flowers v. Blackbeard Sailing Club*, 115 N.C. App. 349, 352-53, 444 S.E.2d 636, 638-39 (1994), *disc. review denied as improvidently granted*, 340 N.C. 357, 457 S.E.2d 599 (1995) (collateral attack on permit application in trespass action properly dismissed for lack of subject matter jurisdiction when plaintiff failed to appeal permit decision through administrative channels); *see also Concerned Citizens v. N.C. Environmental Management Comm'n.*, 89 N.C. App. 708, 711, 367 S.E.2d 13, 15 (1988) (summary judgment dismissing complaint affirmed because failure to seek judicial review of permit decision was "insurmountable bar to plaintiff's claim for declaratory judgment and injunctive relief"). "[W]here the legislature has established by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979) (citations omitted).

[2] The State holds title to lands under navigable waters, such as Chadwick's Bay, in public trust for the use and benefit of all its citizens. *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 525-26, 369 S.E.2d 825, 827-28 (1988). However, the State may permit the exclusive use of such lands by private individuals, *i.e.*, a franchise, for specific purposes, such as shellfishing, *id.* at 527, 369 S.E.2d at 828, and has enacted statutes to facilitate such use. *See* G.S. § 113-201 *et seq.* Indeed, plaintiffs' predecessor in interest obtained a perpetual franchise to cultivate shellfish in the tract pursuant to such a grant. 1887 N.C. Sess. Laws ch. 90.

In an effort to clear title on submerged lands so as to preserve the rights asserted by various individuals, the General Assembly enacted G.S. § 113-205 in 1965. *Rohrer*, 322 N.C. at 531, 369 S.E.2d at 830. The statute provides: "All rights and titles not registered in accordance with this section on or before January 1, 1970, are hereby declared

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null and void.” G.S. § 113-206 established procedures for the resolution of G.S. § 113-205 private claims of title to a bed and fishery rights in submerged lands under navigable waters. *Rohrer*, 322 N.C. at 532, 369 S.E.2d at 830-31. An individual claiming application of G.S. §§ 113-205 or 113-206 “has deprived him of his private property rights in land under navigable waters . . . without just compensation” may appeal to the superior court in the county where the land is situated. G.S. § 113-206(e). Under the statute, therefore, the superior court is accorded subject matter jurisdiction only over appeals of denial of a claim of title or franchise asserted pursuant to G.S. § 113-205.

[3] Plaintiffs contend recognition of their franchise claim limited by designation as a PNA constituted a taking under G.S. § 113-206(d) and therefore was subject to judicial review under G.S. § 113-206(e) without resort to the administrative remedies of G.S. § 150B. Plaintiffs maintain the statute applies in all instances where a claimant has asserted any right in submerged land superior to that of the general public. Notwithstanding plaintiffs’ arguments, we conclude the section is inapplicable to MFD’s denial of a permit to harvest shellfish by mechanical means within submerged lands.

First, plaintiffs’ reasoning confuses grant of a franchise, exclusive to the claimant, to harvest shellfish on a given tract of submerged land, with issuance of a permit designating the methods an exclusive franchise holder may employ in harvesting shellfish thereon. The circumstance that acquisition of a franchise may exclude all others from harvesting shellfish in a given tract does not necessarily preclude limitation upon the harvesting processes utilized by the exclusive franchisee.

Further, plaintiffs’ franchise was not acquired free of government regulation. *See State v. Sermons*, 169 N.C. 285, 287, 84 S.E. 337, 338 (1915) (shellfish come well within police power of State and “are subject to rules and regulations reasonably designed to protect them and promote their increase and growth”). Indeed, the very statute granting the franchise to plaintiffs’ predecessor in interest also gave the shellfish commissioners exclusive jurisdiction and control over shell-fisheries covered by the legislation. 1887 N.C. Sess. Laws ch. 90 § 1. As our Supreme Court recently affirmed in *RJR Technical Co. v. Pratt*, 339 N.C. 588, 453 S.E.2d 147, *reh’g denied*, 340 N.C. 118, 456 S.E.2d 319 (1995),

[t]he right of fishing in the navigable waters of the State belongs to the people in common, to be exercised by them with due

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regard to the rights of each other, and cannot be reduced to exclusive or individual control either by grant or by long user by any one at a given point.

Id. at 591, 453 S.E.2d at 149 (quoting *Bell v. Smith*, 171 N.C. 116, 118, 87 S.E. 987, 989 (1916)). *See also State v. Sutton*, 139 N.C. 574, 575, 51 S.E. 1012, 1012 (1905) (“[t]he right to regulate fisheries, even on private property, is settled beyond controversy”); *Rea v. Hampton*, 101 N.C. 51, 55, 7 S.E. 649, 651 (1888) (“[a]s the Legislature has the undoubted right to regulate the manner in which the right of fishing . . . should be exercised, the plaintiffs have no *right* to fish in its water in any mode not allowed by law”).

In addition, we note the tract was designated a PNA 1 November 1977 and that the administrative rules prohibiting mechanical harvesting of shellfish in such waters were adopted the same date. Plaintiffs’ deed for purchase of the franchise was filed 25 August 1982, more than five years later. Accordingly, plaintiffs’ complaint failed to allege a claim of compensable taking under G.S. § 113-206(e) in consequence of the tract being subject to the challenged PNA restriction at the time of acquisition. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029, 120 L. Ed. 2d 798, 821 (1992) (existing regulation distinguished from future regulation for purposes of a “taking”; “newly legislated or decreed” regulation which prohibits all economically beneficial use of land without compensation constitutes a taking, but latter does not occur and no compensation required when one is barred by rules existing at time title to property acquired); *see also Hughes v. Hwy. Comm. & Oil Co. v. Hwy. Comm. & Equip. Co. v. Hwy. Comm.*, 275 N.C. 121, 130, 165 S.E.2d 321, 327 (1969) (purchaser with notice is chargeable with knowledge he would have acquired had he exercised ordinary care to ascertain truth concerning matters affecting his property interest).

Regulation of the cultivation and harvest of shellfish has been assigned by the General Assembly to MFC, N.C.G.S. §§ 113-201 *et seq.* (1994); *see also* N.C.G.S. § 113-134 (1994), and N.C.G.S. § 143B-289.4 (1993); which in turn has delegated responsibility for issuance of permits for shellfish harvesting to MFD. NCAC tit. 15A r. 3K.0401 (April 1997). Plaintiffs’ dispute was therefore with MFD which refused to authorize plaintiffs to harvest shellfish mechanically within the tract.

[4] Under the version of the Administrative Procedure Act (APA), N.C.G.S. §§ 150B-1 *et seq.* (1991), in effect when plaintiffs’ last application was denied 2 July 1992, a person complaining of action

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by a state agency might challenge that action by initiating a “contested case” with the Office of Administrative Hearings (OAH), G.S. § 150B-23(a), if that person is “aggrieved” as defined in the APA. A person aggrieved is one “directly or indirectly affected substantially in his or its . . . property . . . by an administrative decision.” G.S. § 150B-2(6). Plaintiffs thus qualified as “persons aggrieved” by MFD’s denial of their applications to harvest shellfish mechanically.

[5] The denials were properly appealable within sixty days thereof by filing of a contested case petition with OAH. G.S. § 150B-23(f). The recommended decision of OAH would thereafter have been reviewed by MFD under G.S. § 150B-36, and only following its final determination would judicial review have become available under G.S. § 150B-43. Indeed, plaintiffs’ counsel acknowledged this procedure in his argument before the trial court:

it’s true that had we wanted to object to [the denial of permits], we could have done that, and then they come in and go to the Administrative Law Judge and yes, you’ve got to realize that once he makes a decision, that’s just a recommendation (*sic*) decision, so it goes back to the same board that adopted rules and regulations; if they want to adopt it, rescind it or do anything they want to to it. . . .

While exhaustion of administrative remedies prior to seeking judicial review may not be required in exceptional circumstances, *see Orange County v. North Carolina Dept. of Transportation*, 46 N.C. App. 350, 376-77, 265 S.E.2d 890, 907-08, *disc. review denied*, 301 N.C. 94 (subsequent history not reported in S.E.2d) (1980), allegations of the facts justifying avoidance of the administrative process must be pled in the complaint. *See Huang v. N.C. State University*, 107 N.C. App. 710, 715-16, 421 S.E.2d 812, 815-16 (1992) (summary judgment properly granted when plaintiff failed to allege inadequacy of administrative remedy). The assertion by plaintiffs’ counsel to the trial court in oral argument that “we want to come here and we don’t want to go to the Marine Fisheries,” does not constitute the requisite circumstance. Moreover, such argument may not substitute for supportable allegations, and plaintiffs’ complaint was totally devoid of any allegation asserting futility or inadequacy as grounds for failing to pursue administrative review.

Because plaintiffs have not exhausted nor properly pled justifiable avoidance of the legislatively established administrative remedies for denial of permit applications, they may not in the instant

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separate action mount a collateral attack by claiming such denial constituted a taking of the franchise under G.S. § 113-206(d). *See Flowers*, 115 N.C. App. at 353, 444 S.E.2d at 639. Absent final agency action, the reviewing court lacks a developed record from which to consider the factual background upon which the agency decision rested, *see Presnell*, 298 N.C. at 721-22, 260 S.E.2d at 615, the record bearing special import in cases involving technical matters. *See Leeuwenburg v. Waterway Investment Limited Partnership*, 115 N.C. App. 541, 545, 445 S.E.2d 614, 617 (1994). In the case *sub judice*, the pertinent record before us consists solely of the letters from MFD denying plaintiffs' applications by virtue of the PNA classification.

To summarize, plaintiffs did not exhaust their administrative remedies under G.S. § 150B-1 *et seq.*, for denial of shellfish harvesting permits, and may not collaterally attack the MFD's actions under G.S. § 113-206(e). The trial court thus properly dismissed plaintiffs' complaint for lack of subject matter jurisdiction under N.C.G.S. § 1A-1, Rule 12(b)(1) (1990).

Affirmed.

Judges WYNN and McGEE concur.

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ERIC B. CARLSON, PLAINTIFF v. PATRICIA A. CARLSON (HARRINGTON), DEFENDANT

No. COA96-1098

(Filed 5 August 1997)

1. Divorce and Separation § 136 (NCI4th)— equitable distribution—real property—promise to build access road—valuation

The trial court's valuation of certain property in an equitable distribution action was remanded where the property had been purchased as a site on which to build medical offices; the deed included a provision requiring the grantor to construct an access road, with the cost to be shared but the grantee's portion not to

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exceed \$25,000; the road was never built and plaintiff ultimately selected another site for his medical practice; the cost of building the road was estimated to be \$75,000; and the court determined that the fair market value of the property was \$300,000, added \$75,000 for the cost of the road, and subtracted the \$25,000 debt plaintiff would incur as a result of the improvement. The majority rule precluding the deduction of expenses associated with future sales (which are uncertain in both occurrence and amount) is applicable here. In making a determination of the fair market value of the property, the court must ascertain the price a willing buyer would pay to purchase the land on the open market from a willing seller as of the date of the parties' separation; the value, if any, of the obligation to build an access road is intrinsic to the fair market price and should have been included in the fair market valuation of the property.

2. Divorce and Separation § 139 (NCI4th)—equitable distribution—medical practice—goodwill—valuation

The trial court in an equitable distribution action reasonably approximated the goodwill value of plaintiff's medical practice on the basis of competent evidence and a sound valuation method and did not abuse his discretion where the record shows that the court carefully considered the evidence presented by three different experts and determined that "capitalization of excess earnings" was the appropriate method for determining the fair market value of the practice. Although plaintiff contends that the court erred by finding that the number of interventional cardiologists in Pitt County was too small a sample to provide a useful comparison and by utilizing information regarding the average salaries of invasive cardiologists as published in a national survey, plaintiff's expert testified that he relied on the national survey because it was the only survey he could find that gathered information regarding the specialty of invasive cardiology and that it was a very good source, and other courts have approved using national statistics in determining the goodwill component of a business valuation where the number of businesses in the field is small and the market essentially nationwide or a small local sample prevents collection of reliable information.

Appeal by plaintiff from order entered 4 October 1995 *nunc pro tunc* 15 April 1995 by Judge David A. Leech in Pitt County District Court. Heard in the Court of Appeals 19 May 1997.

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Ward and Smith, P.A., by Shelli Stoker Stillerman and John M. Martin, for plaintiff appellant.

Edward P. Hausle, P.A., by Edward P. Hausle, for defendant appellee.

SMITH, Judge.

Plaintiff and defendant were married on 1 June 1975, separated on 10 October 1991, and divorced on 15 December 1992. Prior to receiving evidence at an equitable distribution hearing, the parties made numerous stipulations regarding the identity, classification, valuation and distribution of a substantial amount of property. On 24 October 1994, an equitable distribution trial was held with regard to the property issues on which the parties were unable to agree. This appeal pertains specifically to the methodology employed by the trial court in determining the value of two marital assets, a ten-acre tract of land and plaintiff's medical practice.

Plaintiff is a cardiologist trained in the highly specialized field of interventional cardiology, a sub-specialty of invasive cardiology. Invasive cardiologists perform diagnostic procedures, such as coronary catheterization, to determine whether a patient has heart disease or blockages in the arteries. Interventional cardiologists are trained to perform the same diagnostic procedures as invasive cardiologists, and in addition perform therapeutic treatments designed to remove blockages from the arteries.

Plaintiff was employed by Quadrangle Medical Specialists, P.A. from 1987 until he resigned in January 1989 and established his own cardiology practice known as Eastern Cardiology. Plaintiff selected a site located in a medical park on Stantonsburg Road in Pitt County (hereinafter Stantonsburg property) on which to build his medical offices.

In January 1990, plaintiff purchased the Stantonsburg property from Park West Properties for \$389,000.00. Plaintiff's deed included a provision requiring the grantor to construct an access road from a public highway at the grantee's request. The cost of the road construction would be shared by the grantor and grantee, with the grantee's portion not to exceed \$25,000.00.

Pursuant to an equitable distribution order entered 4 October 1995 *nunc pro tunc* 15 April 1995, the trial judge made numerous findings of fact valuing the marital assets of the parties. We turn first to

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the contested finding regarding the valuation of the Stantonsburg property.

[1] The trial court found as a fact that the value of the Stantonsburg property was \$300,000.00. In addition the court made the following finding to which plaintiff assigns error:

24. (i) The deed of conveyance to plaintiff required the grantees to build an access road from Stantonsburg Road back to Plaintiff's ten-acre tract. The Court finds from the evidence presented that the cost to build this road, which would have to be built in order to get to plaintiff's land, was estimated to be no less than \$75,000.00. The deed required the grantee, plaintiff, to pay up to, but no more than, \$25,000.00 toward the road construction costs. The Court finds as a fact that the value of plaintiff's land is increased over the \$30,000.00-per-acre value because the deed to plaintiff required the grantor to spend a sum (which the Court finds would be not less than \$75,000.00 for the road), which is greater than the maximum (\$25,000.00) plaintiff has to spend to build the road. The value of plaintiff's land is therefore increased because of the obligation of the grantor to build this road for plaintiff, and the increased value is \$50,000.

(i) [sic] Therefore, the gross fair market value of the 10 acres was \$350,000.

Plaintiff contends that because the access road was never actually constructed, the trial court improperly based its valuation of the Stantonsburg property upon a fact not in existence at the date of separation.

N.C. Gen. Stat. § 50-21(b) (1995) provides that “[f]or purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties.” In making a determination as to net market value of a marital asset, the trial court is required to only consider evidence of the value of the property as of the date of separation. *Christensen v. Christensen*, 101 N.C. App. 47, 55, 398 S.E.2d 634, 639 (1990). As of 10 October 1991, the date of separation, the access road had not been constructed. The evidence of the value the grantor's *promise* to build the road may have added to the land was mere speculation and improperly considered by the trial court. However, defendant contends that the trial court properly considered evidence of the promise to build a road because the *obligation* was a fact in existence as of the date of separation.

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Prior to ordering an equitable distribution of marital property, the trial judge is required to calculate the net fair market value of the property. *Beightol v. Beightol*, 90 N.C. App. 58, 63, 367 S.E.2d 347, 350, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988). “Fair market value is defined as the price which a willing buyer would pay to purchase the asset on the open market from a willing seller, with neither party being under any compulsion to complete the transaction.” Brett R. Turner, *Equitable Distribution of Property* § 7.03, at 505 (2d. ed. 1994). The trial court calculates the net fair market value, by reducing the fair market value of the property by the value of any debts that are attached to the asset. *Id.* at 505.

In this case, the trial court first determined the fair market value of the Stantonsburg property to be \$300,000.00. The court then added \$75,000.00 representing the cost of the road construction and then subtracted the \$25,000.00 debt plaintiff would incur as a result of the improvement; calculating a net added value of \$50,000.00.

The case *sub judice* is analogous to equitable distribution actions in which some trial courts have erroneously reduced the value of an asset by the cost of projected expenses associated with a possible future sale of the asset. The majority of jurisdictions hold that when determining the net fair market value of an asset, “the court should deduct only debts which are reasonably certain to exist in the near future.” *Id.* at 506. Accordingly, most jurisdictions hold that costs associated with hypothetical sales of assets should not be subtracted from the fair market value of the property. *See e.g. McDaniel v. McDaniel*, 829 P.2d 303 (Alaska 1992); *Taber v. Taber*, 626 So. 2d 1089 (Fla. Dist. Ct. App. 1993); *In re Benkendorf*, 252 Ill. App. 3d 429, 624 N.E.2d 1241 (1993); *Goodwin v. Goodwin*, 640 So. 2d 173 (Fla. Dist. Ct. App. 1994). When an actual sale of an asset is not imminent, “expenses of sale are hypothetical liabilities which may well never be incurred.” Turner, *supra* § 7.03 n.73 (Supp. 1996).

Moreover, the expenses of a future sale of an asset are uncertain in both occurrence and amount. *Id.* For example, the property owner may die and thus never sell the asset. *Id.* In any event, even if the sale does take place in the future, unless the sale is imminent, there is no reasonable basis upon which to predict the amount of expenses related to the sale. *Id.*

The majority rule precluding the deduction of expenses associated with future sales is equally applicable to the facts of this case. Plaintiff presented evidence showing that on several occasions he

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made oral and written demands to Park West requesting construction of the access road. Yet, as of the date of the equitable distribution hearing, a full three years after the date of separation, plaintiff was unaware of any plans to begin road construction on the Stantonsburg property. In fact, plaintiff ultimately decided to select another site on which to locate his medical practice due to the failure of Park West to provide the promised road.

In making a determination as to the fair market value of the Stantonsburg property, the trial court must ascertain the price a willing buyer would pay to purchase the land on the open market from a willing seller as of the date of the parties' separation. The value, if any, of the obligation to build an access road on the property is intrinsic to the fair market price and should have been included in the trial court's fair market valuation of the real property. The trial court's findings of fact numbered 24(i) and (i) [sic] are vacated and the case is remanded for a determination of the fair market value of the Stantonsburg property on the date of separation, to include the value, if any, of the obligation to construct a road to the property.

[2] Next, we examine plaintiff's assignment of error regarding the trial court's valuation of plaintiff's medical practice, particularly the "goodwill" component of the practice. Goodwill, the most difficult element of a professional practice to value, is "commonly defined as the expectation of continued public patronage." *Poore v. Poore*, 75 N.C. App. 414, 420, 331 S.E.2d 266 271, *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985). "It is an intangible asset which defies precise definition and valuation." *Id.* "There is no set rule for determining the value of the goodwill of a professional practice; rather, each case must be determined in light of its own particular facts." *Id.* at 421, 331 S.E.2d at 271 (citations omitted). If it appears that the trial court, based on competent evidence and a sound valuation method, reasonably approximated the goodwill value of plaintiff's medical practice, that valuation will not be disturbed on appeal. *Id.* at 422, 331 S.E.2d at 272.

The record shows that the trial court carefully considered the evidence presented by three different experts and determined that "capitalization of excess earnings" was the appropriate method for determining the fair market value of plaintiff's medical practice. This Court has described the capital excess earnings method as a proper and legitimate means of measuring the present value of goodwill. *Id.* at 421, 331 S.E.2d at 271. Under this approach, the trial court first

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determines the difference between plaintiff's actual earnings and the earnings of the "average" similarly situated physician. Turner, *supra* § 7.07, at 533; *see also Poore*, 75 N.C. App. at 421-422, 331 S.E.2d at 271-72. The difference between the compared earnings is then multiplied by a number (the factor) between one and five to yield the final value. Turner, *supra* § 7.07, at 533. The accuracy of this approach depends significantly upon the accuracy of the "average" statistics used in the comparison. *Id.* at 535.

Plaintiff contends that the trial judge committed reversible error by utilizing information regarding the average salaries of invasive cardiologists as published in a national survey entitled *Physician Compensation and Production Survey: 1992 Report Based on 1991 Data* (hereinafter "*Physician Survey*") to make a determination as to the average salary of a similarly situated physician. Plaintiff contends that the trial court was required to utilize evidence presented as to the average salary of interventional cardiologists in Pitt County. We disagree.

The trial court relied on the testimony and evidence presented by Edward Strange, plaintiff's expert in the field of evaluation of medical practices. Mr. Strange testified that in calculating the goodwill component of plaintiff's medical practice, he relied on the *Physician Survey* because it was the only salary survey he could find that gathered information regarding the specialty of invasive cardiology. He also testified that it was a very good source because it included information on fringe benefits and compensation amounts "in terms of total production" as well as general compensation information.

To ascertain the salary of a physician similarly situated to plaintiff, Mr. Strange adopted the *Physician Survey* salary for an invasive cardiologist in the 90th percentile. Mr. Strange explained in his *Valuation Report*, that he used the 90th percentile column because he believed that the "conditions for earning ability in Greenville, North Carolina for invasive cardiologists would be represented in the upper strata." During direct examination, he noted that the salary he selected was somewhat lower than the average earnings reported by Pitt County interventional cardiologists.

In finding the goodwill component of plaintiff's medical practice, the trial judge rejected utilizing either the salary of the invasive cardiologist in the 90th percentile or the average salary of Pitt County interventional cardiologists. Rather, he determined the similarly situated physician salary by relying on the average salary of an invasive

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cardiologist in the 75th percentile as reported in the *Physician Survey*. In selecting the disputed salary, the trial judge explained his reasoning as follows:

[Finding #28(c)] . . . The Court finds from the evidence that a similarly situated invasive cardiologist would earn \$418,000.00 per year. This salary figure is higher (in the 75th percentile) than the medial salary, because the plaintiff is a very hard-working individual, who strives to perfection, and who is ambitious in the best sense of the word. He is skilled in marketing his practice, and he is a “hard-driving” physician. The Court finds that Dr. Carlson also possesses an exceptionally higher level of skill than other invasive cardiologists. . . .

[T]he average income of interventional cardiologists practicing in Pitt County should not be considered because this group represents too small of a statistical sample, and all of the interventional cardiologists practicing in Pitt County may have practice good will . . .

[T]he Court does not find these physicians to be similarly situated, because a comparison of plaintiff to approximately six cardiologists in Pitt County provides too small a statistical basis or sample for this Court to find this comparison meaningful or reliable in finding the similarly situated physician. Additionally, Dr. Carlson actively markets his practice with advertising, clinics, and the like, and there is no evidence that the other Pitt County physicians market at all, much less to the degree of Dr. Carlson.

Plaintiff objects to the trial court’s finding that the number of interventional cardiologists in Pitt County was too small a sample to provide a useful comparison. He contends the trial judge was required to utilize the average salaries of local interventional cardiologists. We disagree.

Other courts have approved of the use of national statistics in determining the goodwill component of a business valuation “[w]here the number of businesses in the field is small and the market is essentially nationwide” or a “small local sample size prevents collection of reliable information.” Turner, *supra* § 7.07 at 536; *see e.g. In re Bookout*, 833 P.2d 800 (Colo. Ct. App. 1991) (using American Physical Therapists Association survey data); *Clark v. Clark*, 782 S.W.2d 56 (Ky. Ct. App. 1990) (using American Medical Association survey of obstetrical practices data). Given the facts and circumstances of this

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case, the trial judge did not abuse his discretion by utilizing national salary statistics to calculate the goodwill component of plaintiff's medical practice.

The trial court reasonably approximated the goodwill value of plaintiff's medical practice on the basis of competent evidence and a sound valuation method. The court's findings and conclusions with regard to the valuation of plaintiff's professional practice will not be disturbed on appeal.

Vacated and remanded in part, affirmed in part.

Judges EAGLES and MCGEE concur.

SANDRA BARRETT, PLAINTIFF v. CARL A. HYLDBURG, DEFENDANT

No. COA96-628

(Filed 5 August 1997)

1. Appeal and Error § 89 (NCI4th)— appeal from motion in limine—recovered memories excluded—premature

An appeal from the trial court's grant of defendant's motion *in limine* to exclude from a civil assault and emotional distress action recovered memories of childhood sexual abuse was premature, even though the trial court found that the allowance of the motion affected a substantial right of plaintiff, because it could not be said that such right would be lost or less than adequately protected by exception to the order. Without this evidence, plaintiff's suit would be a candidate for summary adjudication and, upon appeal from such judgment, plaintiff would be afforded full opportunity to argue that such evidence was improperly excluded. However, while plaintiff's appeal thus does not satisfy the two part test required for appeal of an interlocutory order, it was treated in the Court of Appeals' discretion as a petition for writ of certiorari.

2. Evidence and Witnesses § 2047 (NCI4th)— recovered memory—admissible only with expert testimony

On remand of plaintiff's action against her father for civil assault and emotional distress based on recovered memories of

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childhood sexual abuse where the trial court had granted a motion *in limine* excluding the evidence of recovered memories, plaintiff may not proceed with evidence of her alleged repressed memories of childhood sexual abuse without accompanying expert testimony on the phenomenon of memory repression. Plaintiff may not express the opinion that she herself has experienced repressed memory. Even assuming she were not to use the term “repressed memory” and simply testified that in 1993 she suddenly remembered traumatic incidents from her childhood, such testimony must be accompanied by expert testimony on the subject of memory repression so as to afford the jury a basis upon which to understand the phenomenon and evaluate the reliability of testimony derived from such memories.

3. Appeal and Error § 342 (NCI4th)— cross-assignment of error—denial of summary judgment—appeal from granting of motion in limine—cross-assignment of error dismissed

Defendant’s cross-appeal from the failure of the trial court to grant his motion for summary judgment in an action for civil assault and emotional distress based upon recovered memories of childhood sexual abuse was dismissed where he assigned as error neither an action nor an omission of the trial court which deprived him of an alternative basis for supporting the order from which plaintiff appealed.

Appeal by plaintiff from order entered 26 February 1996 by Judge Ronald E. Bogle in Buncombe County Superior Court. Heard in the Court of Appeals 18 February 1997.

Wise, Pratt-Thomas, Pearce, Epting & Walker, P.A., by Gregg Meyers and Mary Beth Arrowood, for plaintiff-appellant.

Blue, Fellerath, Cloninger, Barbour & Arcuri, P.A., by John C. Cloninger, and Robert E. Riddle, P.A., by Robert E. Riddle, for defendant-appellee.

JOHN, Judge.

Plaintiff appeals the trial court’s grant of defendant’s motion *in limine* to exclude evidence regarding plaintiff’s alleged “repressed memories” of sexual abuse. Although plaintiff’s appeal is premature, we elect in our discretion to address the singular issue she presents at this time.

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Pertinent factual and procedural information is as follows: Plaintiff filed suit against defendant, her father, 28 February 1994, alleging claims of assault and battery, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiff, approximately forty-five years old at the time of filing her complaint, maintained defendant had "engaged in intimate sexual contact" with her as a minor. In an affidavit and deposition later filed with the court, plaintiff asserted she recalled two instances of sexual contact with defendant. The first was an occasion when she was six years old and being bathed by defendant. According to plaintiff, defendant "stimulated [her] genitals" when he washed between her legs and became angry when she "screamed that it tickled." Second, plaintiff alleged that when she was not quite three years old, she was awakened one night in her bedroom "by my father's left hand tightly clenched around my neck and his penis in my throat." Plaintiff explained she did not recover memories of these incidents until February and March 1993, approximately forty years later. She indicated her first recollection came "spontaneously" after viewing part of the television program "Not in My Family," dealing with the topic of child sexual abuse.

Defendant filed answer denying the essential allegations of plaintiff's complaint and subsequently moved for summary judgment, claiming plaintiff's claims were barred by the applicable statutes of limitation, N.C.G.S. § 1-52(5) and N.C.G.S. § 1-54(3), and the statute of repose, N.C.G.S. § 1-52(16). This motion was denied in an order entered 21 August 1995.

Defendant subsequently filed a motion *in limine* to exclude all evidence of plaintiff's "repressed memories." Defendant argued such evidence would require expert testimony on the phenomenon of memory repression in order to be admissible. Defendant further maintained the evidence would in any event ultimately be inadmissible in that "repressed memory has not gained general acceptance within the relevant scientific community" and has not been shown to be reliable. The trial court granted defendant's motion 26 February 1996 in a detailed "Memorandum and Order" which included the following conclusions of law:

1. The alleged repressed memory evidence to be offered by plaintiff is beyond the life experience of the average juror, and therefore, a juror would have no basis on which to judge, evaluate or determine the credibility or reliability of the alleged victim's tes-

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timony. The theory of repressed memory is a psychological concept which must be established, if at all, by the relevant expert scientific community. . . .

2. . . . The Court concludes that attempts to test the theory of repressed memory have been made, but that thus far the theory has been beyond scientific verification; there has been substantial publication about repressed memory, but rather than verifying the theory, the publications highlight the debate raging in the scientific community about the validity of the phenomenon of repressed memory; and finally, there has been no general acceptance in the relevant scientific community of the theory of repressed memory.

3. The Court concludes that the lack of reliability of the phenomenon of repressed memory prevents such evidence from being of any assistance to the trier of fact, and the Court is of the opinion that the testimony of experts for both the plaintiff and defendant would not assist the jurors in determining the reliability of such evidence, inasmuch as the relevant scientific community itself is unable to vouch for its reliability.

The court further determined its grant of defendant's motion *in limine* affected "a substantial right" of plaintiff, and plaintiff filed notice of appeal to this Court 27 March 1996. Defendant cross-assigned as error denial of his summary judgment motion, and, in the alternative, filed a petition for writ of certiorari with this Court requesting we review the denial of that motion.

[1] Although defendant has not challenged plaintiff's appeal as premature, it is our responsibility to address the issue prior to consideration of the merits of plaintiff's appeal. *See Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980).

We first observe that a trial court's ruling on a motion *in limine* is an interlocutory ruling which may be changed when the evidence is offered at trial. *State v. Swann*, 322 N.C. 666, 686, 370 S.E.2d 533, 545 (1988). While appeal of right lies from a final judgment, interlocutory orders generally are not appealable subject to certain specific statutory exceptions. *Brown v. Brown*, 77 N.C. App. 206, 207-8, 334 S.E.2d 506, 507-8 (1985), *disc. review denied*, 315 N.C. 389, 338 S.E.2d 878 (1986); *see* N.C.G.S. § 1-277 (1996); N.C.G.S. § 1A-1, Rule 54(b) (1990); and N.C.G.S. § 7A-27(d) (1995).

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The trial court's order expressed its determination that allowance of defendant's motion *in limine* affected a substantial right of plaintiff. See G.S. § 1-277(a) and G.S. § 7A-27(d)(1). Appeal of an interlocutory order based upon impairment of a substantial right requires a finding (1) that the right in question qualifies as "substantial," and (2) that, absent immediate appeal, the right will be "lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 6, 362 S.E.2d 812, 815 (1987). The particular facts of each individual case and the procedural context in which the contested order was entered govern the former determination. *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982).

Assuming *arguendo* the trial court properly characterized its order as affecting a "substantial right," it cannot be said that such right would be "lost" or "less than adequately protected by exception" to the order. *Slurry*, 88 N.C. App. at 6, 362 S.E.2d at 815. Without evidence of her alleged recovered memories, an essential component of plaintiff's case, plaintiff's suit would be a candidate for summary adjudication. Upon appeal from such judgment, plaintiff would be afforded full opportunity to argue such evidence was improperly excluded. See *Bailey*, 301 N.C. at 210, 270 S.E.2d at 434 (plaintiff's exception to court's interlocutory order fully protected her right to appeal order after final judgment on the merits). While plaintiff's appeal thus does not satisfy the two part test enunciated herein, we treat it in our discretion as a petition for writ of certiorari, see N.C.R. App. P. 21(a)(1), and allow the writ to address the singular issue presented. See *Rudder v. Lawton*, 62 N.C. App. 277, 279, 302 S.E.2d 487, 489 (1983) (writ granted to address trial court's order allowing motion *in limine*).

[2] The trial court's order regarding defendant's motion *in limine* essentially contained two determinations: 1) plaintiff's testimony as to her allegedly repressed memories was precluded absent accompanying expert testimony explaining to the jury the phenomenon of memory repression, and 2) expert testimony regarding repressed memory would be excluded because of the lack of scientific assurance of the reliability of repressed memory as an indicator of what has actually transpired in the past. Plaintiff's brief to this Court addresses only the first of these determinations. See N.C.R. App. P. 28(a) (review limited to questions set forth in appellant's brief). She contends her testimony regarding recovery of memories of abuse by

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defendant constitutes admissible lay testimony consisting of her sensory perceptions, *see* N.C.R. Evid. 701, and insists expert testimony on repressed memory need not be a component of her case. We hold plaintiff's testimony regarding recovered memories of abuse may not be received at trial absent accompanying expert testimony on the phenomenon of memory repression.

A New Hampshire court has spoken on the subject with precision:

A jury can most assuredly understand the infirmities of memories and the motives that shape them in the normal course of their experience. The jurors are completely capable of evaluating the accuracy of the memory and the credibility of the person testifying from it, by virtue of the ordinary knowledge, common sense, and practical experience by which we all make such determinations in our everyday lives.

However, the very concept of a "repressed" memory, that is, that a person can experience a traumatic event, and have no memory of it whatsoever for several years, transcends human experience. There is nothing in our development as human beings which enables us to empirically accept the phenomenon, or to evaluate its accuracy or the credibility of the person "recovering" the memory. The memory and the narration of it are severed from all the ordinary human processes by which memory is commonly understood. To argue that a jury could consider such a phenomenon, evaluate it and draw conclusions as to its accuracy or credibility, without the aid of expert testimony is disingenuous to say the least.

State v. Hungerford, 1995 WL 378571, p. 3 (N.H. Super. Ct. May 23, 1995), *aff'd*, 1997 WL 358620 (N.H. July 1, 1997); *see also Shahzade v. Gregory*, 923 F. Supp. 286, 287 (D. Mass. 1996) (repressed memory beyond understanding of jury; expert testimony appropriate); *Commonwealth v. Crawford*, 682 A.2d 323, 329 (Pa. Super. Ct. 1996), *appeal granted*, 693 A.2d 965 (Pa. 1997) (expert testimony regarding repressed memory required); *cf. Isley v. Capuchin Province*, 877 F. Supp. 1055, 1063-64 (E.D. Mich. 1995) (court must screen expert testimony on repressed memory for reliability); *State v. Quattrocchi*, 681 A.2d 879, 883-84 (R.I. 1996) (judge must determine reliability before allowing repressed memory testimony).

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In *State v. Kelly*, 118 N.C. App. 589, 596, 456 S.E.2d 861, 868, *disc. review denied*, 341 N.C. 422, 461 S.E.2d 764 (1995), this Court observed that a mother—who advanced the opinion that her son had repressed memories of sexual abuse by the defendant—was testifying “to matters reserved for expert testimony.” See N.C.R. Evid. 702 (experts may testify regarding “scientific, technical or other specialized knowledge”) and N.C.R. Evid. 703 (expert testimony need not be based on personal knowledge). Likewise, in the present case, plaintiff may not express the opinion she herself has experienced repressed memory. Moreover, even assuming plaintiff were not to use the term “repressed memory” and simply testified she suddenly in 1993 remembered traumatic incidents from her childhood, such testimony must be accompanied by expert testimony on the subject of memory repression so as to afford the jury a basis upon which to understand the phenomenon and evaluate the reliability of testimony derived from such memories. See *Hungerford*, 1997 WL 358620 at p.6 (“[I]f the subject matter in dispute is beyond the general understanding of a jury, the party bearing the burden of proof must adduce expert testimony to explain such evidence.”).

[3] Turning to defendant’s assignment of error to the court’s failure to grant his motion for summary judgment, we note it was not properly the subject of a “cross-assignment of error.” Defendant assigned as error neither an action nor an omission of the trial court which deprived him of an alternative basis for supporting the order from which plaintiff has appealed, *i.e.*, the order granting defendant’s motion *in limine*. See N.C.R. App. P. 10(d). Defendant’s appeal is therefore dismissed, and we decline his request that we grant certiorari.

In conclusion, we affirm the trial court’s decision that plaintiff may not proceed with evidence of her alleged repressed memories of childhood sexual abuse without accompanying expert testimony on the phenomenon of memory repression, and remand the case for further proceedings. We are cognizant the trial court’s order purports to exclude such testimony at trial as scientifically unreliable, but reiterate that a motion *in limine* decision is one “which a trial court may change when the evidence is offered at trial,” *Swann*, 322 N.C. at 686, 370 S.E.2d at 545. Such further ruling *and* a final judgment on plaintiff’s cause of action are due before this case again comes to our Court for review. See *Brown*, 77 N.C. App. at 209, 334 S.E.2d at 508 (rules concerning appeals “are designed to allow the trial court to fully dispose of a case before an appeal can be heard”).

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Affirmed and remanded in part; appeal dismissed in part.

Judges EAGLES and COZORT concur.

Judge COZORT concurred prior to 31 July 1997.

CYNTHIA ROYAL MAYNOR, PLAINTIFF V. ONSLOW COUNTY, DEFENDANT

No. COA96-1237

(Filed 5 August 1997)

1. Parties § 12 (NCI4th)— agent of owner—not real party in interest

An agent of the owner is not a real party in interest and cannot maintain an action without the owner. However, since neither party raised the issue, the manager of an adult business will be treated as if she is the real party in interest in this appeal from an order enforcing a county ordinance regulating the location of adult businesses.

2. Municipal Corporations § 332 (NCI4th); Counties § 86 (NCI4th)— absence of comprehensive zoning ordinance— ordinance regulating location of adult businesses

The failure of a county to adopt a comprehensive zoning ordinance did not preclude the county from enacting an ordinance regulating the location of adult and sexually oriented businesses pursuant to its police powers under N.C.G.S. § 153A-121. Furthermore, the ordinance was a valid exercise of the county's police powers.

3. Constitutional Law § 64 (NCI4th); Municipal Corporations § 332 (NCI4th)— location of adult businesses—ordinance not overbroad

A county ordinance regulating the location of adult and sexually oriented businesses was not unconstitutionally overbroad where the ordinance was not intended to restrict any communication or speech or to deny adults access to any materials.

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4. Constitutional Law § 49 (NCI4th)— vagueness of ordinance—absence of standing to challenge

The manager of an adult business did not have standing to argue that the definition of “adult business” in a county ordinance regulating the location of adult businesses was unconstitutionally vague where she acknowledged in her pleadings that the ordinance applied to her business and that enforcement of the ordinance would result in the closing of her business, and she failed to show that the ordinance affects protected communication.

5. Appeal and Error § 419 (NCI4th)— preemption issue—absence of assignment of error

Where no assignment of error corresponds to the issue of preemption, that issue was not properly before the appellate court. N.C. R. App. P. 10(a).

Appeal by plaintiff from order entered 2 May 1996 by Judge James R. Strickland in Onslow County Superior Court. Heard in the Court of Appeals 20 May 1997.

Lanier and Fountain, by Keith E. Fountain, for plaintiff appellant.

Shipman & Associates, L.L.P., by Gary K. Shipman, C. Wes Hodges, II, and Carl W. Thurman, III, for defendant appellee.

COZORT, Judge.

Plaintiff appeals from the superior court order dismissing her action seeking to prevent enforcement of Onslow County’s Ordinance to Regulate Adult Businesses (the Ordinance) and enjoining her from operating the adult business, The Doll House. We affirm the trial court.

Plaintiff is the manager of The Doll House in Jacksonville. On or about 21 September 1992, the Onslow County Board of County Commissioners (the County) adopted an ordinance regulating the location of adult and sexually oriented businesses in Onslow County. Any adult or sexually oriented business not in compliance with the Ordinance after 21 September 1994 was to be discontinued pursuant to the Ordinance. The purpose of the Ordinance was set forth in the resolution adopted by the Commissioners:

[A]fter comprehensive study of potential deleterious secondary effects of certain types of sexually oriented adult businesses, the

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Board of Commissioners of Onslow County finds that it is appropriate and necessary to prevent those deleterious secondary effects which can reasonably be expected to result from the inappropriate location or concentration of such businesses

Onslow County Code. The resolution also provides that “it is not the intent of the Board of Commissioners of Onslow County . . . to deny reasonable access to the distributors and exhibitors of sexually oriented entertainment to their intended market” *Id.*

An adult business as defined by the Ordinance is “any business activity, club or other establishment which permits its employees, members, patrons or quest [*sic*] on its premises to exhibit any specified anatomical areas before any other person or persons.” *Onslow County Code, Art. IV(c)*. The Ordinance prescribes the location of sexually oriented businesses (defined in the Ordinance) and adult businesses. The portion of the Ordinance regulating adult businesses is as follows:

- (ii) No adult business shall be permitted in any building:
 - (a) located within 1000 feet in any direction from a building used as a dwelling.
 - (b) located within 1000 feet in any direction from a building in which an adult business or a sexually oriented business is located.
 - (c) located within 1000 feet in any direction from a building used as a church, synagogue, or other house of worship.
 - (d) located within 1000 feet in any direction from a building used as a public school or as a state licensed day care center.
 - (e) located within 1000 feet in any direction from any lot or parcel on which a public playground, public swimming pool, or public park is located.

Onslow County Code, Art. V(ii).

The Ordinance defines specified anatomical areas “as less than completely and opaquely covered human genitals, pubic regions, buttocks and female breasts below a point immediately above the top of the areola.” *Onslow County Code, Art. IV(I)*.

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In an affidavit made part of the record, plaintiff acknowledges that The Doll House is located within one thousand feet of a residence. In her complaint, plaintiff alleges that if the Ordinance is enforced, it will result in the closing of The Doll House.

On 8 August 1994, the County zoning officer sent plaintiff a letter informing her that the Ordinance would take effect on 21 September 1994 and that any nonconforming businesses “shall be discontinued.” A copy of the Ordinance was attached to the letter. On 20 September 1994, plaintiff filed the present action. Defendant answered and counterclaimed seeking an injunction enforcing the Ordinance on The Doll House.

Both plaintiff and defendant moved for summary judgment. The trial court received briefs and affidavits and heard arguments from the parties. The court found there were no genuine issues of material fact and found defendant County was entitled to judgment as a matter of law. The court enjoined plaintiff from operating The Doll House and dismissed her civil action. Plaintiff appeals.

[1] As a preliminary matter, we note that it appears from the record that plaintiff may not be the real party in interest in this matter. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 17(a) (1996 Cum. Supp.), every claim “shall be prosecuted in the name of the real party in interest.” All of the pleadings indicate that plaintiff “manages and operates” The Doll House. The record is unclear as to whether plaintiff owns or has a proprietary interest in The Doll House. An agent of the owner is not a real party in interest and cannot maintain an action without the owner. *Booker v. Everhart*, 294 N.C. 146, 154, 240 S.E.2d 360, 364 (1978). However, since neither party raises this issue and for the purposes of this appeal, we treat plaintiff as if she is appropriately the real party in interest.

[2] Plaintiff argues that the County was precluded from enacting this Ordinance because it did not have a comprehensive zoning plan. We disagree. Counties may enact ordinances regulating land use in two fashions: one, pursuant to a comprehensive zoning plan, N.C. Gen. Stat. § 153A-341 (1991) and two, pursuant to their police powers, N.C. Gen. Stat. § 153A-121 (1991). In the present case, there is no evidence in the record that Onslow County has a comprehensive zoning plan. In its answer, defendant admits it does not have a formal countywide master zoning plan document in place. Thus we focus solely on the county’s police powers. Our legislature delegated to counties the power to make ordinances to “define, regulate, prohibit, or abate

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acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county.” N.C. Gen. Stat. § 153A-121(a). When a county adopts an ordinance designed to promote the health, safety and welfare of the county’s residents, N.C. Gen. Stat. § 153A-121 empowers the county to adopt such ordinance without complying with the procedural safeguards provided in N.C. Gen. Stat. § 153A-341.

In *Summey Outdoor Advertising v. Henderson County*, 96 N.C. App. 533, 386 S.E.2d 439 (1989) *disc. review denied*, 326 N.C. 486, 392 S.E.2d 101 (1990), this Court upheld a Henderson County ordinance regulating the location and placement of outdoor advertising. We held that defendant’s failure to adopt a countywide zoning ordinance did not preclude defendant county from regulating outdoor advertising signs under N.C. Gen. Stat. § 153A-121. *Summey*, 96 N.C. App. at 538, 386 S.E.2d at 443.

With the present Ordinance, the Commissioners have regulated the location of adult and sexually oriented businesses. They have not prohibited them. Further, their stated purpose in doing so is for “promoting the health, safety, morals and general welfare of the citizenry of Onslow County.” *Onslow County Code, Art. II*. We hold the Onslow County Ordinance to be well within the parameters of N.C. Gen. Stat. § 153A-121.

[3] Plaintiff next contends that the Ordinance is unconstitutionally overbroad and vague.

An overly broad statute or ordinance is one “which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press.” *Thornhill v. Alabama*, 310 U.S. 88, 97, 84 L. Ed. 1093, 1100 (1940). In her brief, plaintiff cites no protected freedom which is threatened by the Ordinance. Furthermore, it is clear from the County Commission’s resolution that the Ordinance was not intended to restrict any communication or protected speech or to deny adults access to the distributors of sexually oriented entertainment. The Ordinance is an attempt to regulate the location and the access to these materials. “The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating [an] ordinance[].” *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 62, 49 L. Ed. 2d 310, 321, *reh’g denied*, 429 U.S. 873, 50 L. Ed. 2d

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155 (1976). It is within the constitutional powers of a county or municipality to adopt regulations which limit the areas in which adult entertainment establishments may operate. *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140, 145 (4th Cir. 1991); *Young*, 427 U.S. 50, 49 L. Ed. 2d 310; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 89 L. Ed. 2d 29, *reh'g denied*, 475 U.S. 1132, 90 L. Ed. 2d 205 (1986). Plaintiff's argument that the Ordinance is overbroad fails.

[4] A statute or ordinance is vague if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 70 L. Ed. 322, 328 (1926). A vague statute fails to inform those to whom it is directed of its application to them and therefore violates due process of law. *Id.*

Plaintiff argues the definition of "adult business" is vague. Adult business is defined as:

any business activity, club or other establishment which permits its employees, members, patrons or quest [*sic*] on its premises to exhibit any specified anatomical areas before any other person or persons.

Onslow County Code, Art. IV(c); see also, Art. V(A)(I). Plaintiff argues that numerous otherwise legal actions are conceivably prohibited from being conducted within 1000 feet of each other. Plaintiff lists doctors' offices, health clubs, school locker rooms, and diaper changing stations as possibly running afoul of the Ordinance. We need not consider these arguments. Plaintiff acknowledged in her pleadings that the Ordinance applies to her. Any element of vagueness has not affected her. To the extent that plaintiff's objection to the Ordinance is predicated on inadequate notice resulting in a denial of due process, her objections are rejected. *Young*, 427 U.S. at 59, 49 L. Ed. 2d at 319.

The plaintiffs in *Young* argued that because the ordinance impacted communication protected by the First Amendment, they had standing to raise the vagueness issue although there was no uncertainty about the applicability of the ordinance to them. *Id.* Unpersuaded that the zoning ordinance in question would have a deterrent effect on the exhibition of films protected by the First Amendment, the Supreme Court rejected this argument. The Court held

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if the statute's deterrent effect on legitimate expression is not "both real and substantial," and if the statute is "readily subject to a narrowing construction by the state courts," the litigant is not permitted to assert the rights of third parties.

Id. at 60, 49 L. Ed. 2d at 320 (citation omitted).

Plaintiff here fails to show any effect by this Ordinance on protected communication. Plaintiff does not have standing to raise this constitutional argument.

Plaintiff argues that *Treants Enterprises, Inc. v. Onslow County*, 94 N.C. App. 453, 380 S.E.2d 602 (1989), the escort service case, controls the present case. We disagree. In *Treants*, the Onslow County ordinance in question purported to regulate escort services. The ordinance required operators to apply for licenses and established a "registry" of employees in the county sheriff's department. *Id.* at 455, 380 S.E.2d at 603. In addition the ordinance required the businesses to keep records of client or customer transactions and to make these records available to the sheriff's department. *Id.* at 456, 380 S.E.2d at 603. This Court found the ordinance was void for both vagueness and overbreadth. *Id.* at 461, 380 S.E.2d at 606. We held the ordinance impermissibly infringed upon the First Amendment right of citizens to freedom of association by imposing "the tangible presence of the State in the social affairs of its citizens each time a citizen wishes to utilize the services of an escort." *Id.* at 459, 380 S.E.2d at 605. In addition, the ordinance defined escort as "[a]ny person who, for hire or reward, accompanies others to or about social affairs, entertainment or places of amusement." *Id.* at 461, 380 S.E.2d at 606. The Court found that the term "escort" was susceptible to many other connotations and that persons of common intelligence would have to guess at its applicability. *Id.*

As we stated above, Maynor cites no constitutional right of hers which is threatened by the Ordinance at issue. Furthermore, the Ordinance is a regulation of the place and manner of expression only and is not violative of the First Amendment. *See also, Hart Book Stores v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929, 65 L. Ed. 2d 1124 (1980). Here plaintiff concedes the Ordinance's applicability to her, and unlike *Treants*, no one is required to guess as to the Ordinance's applicability to her.

[5] Finally, we summarily reject plaintiff's argument that the state has preempted the county with passage of Article 26A of Chapter 14

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of the North Carolina General Statutes. Neither of plaintiff's two assignments of error assigns preemption as a legal basis of error. Since no assignment of error corresponds to the issue raised, it is not properly before us. N.C.R. App. P. 10(a) (1997); *Kimmel v. Brett*, 92 N.C. App. 331, 374 S.E.2d 435 (1988).

In conclusion, we hold the Ordinance is a valid exercise of the powers granted to the County by N.C. Gen. Stat. § 153A-121 and that plaintiff's constitutional challenge to the Onslow County Ordinance fails. The trial court did not err in dismissing plaintiff's case or in enforcing the Ordinance upon her.

Affirmed.

Judges MARTIN, Mark D., and TIMMONS-GOODSON concurred in this opinion prior to 31 July 1997.

LORETTA E. HOLTERMAN (GAMBLE), PLAINTIFF V. WILLIAM G. HOLTERMAN,
DEFENDANT

COA96-1034

(Filed 5 August 1997)

1. Courts § 111 (NCI4th)— district court—recordation of trial—waiver absent request

In district court where there are no official court reporters, a party seeking recordation of a hearing or trial must request a reporter or mechanical recordation; if the party makes no request, Rule 10(b)(1) prevents the issue from being raised on appeal. N.C. R. App. P. 10(b)(1).

2. Divorce and Separation § 121 (NCI4th)— equitable distribution—investments—inheritances—inability to trace—marital property

The trial court did not err in classifying all of the parties' investments as marital property where plaintiff had received two sizeable inheritances during the parties' marriage but was unable to trace her inheritances to present assets jointly owned by the parties at the time of separation, and the evidence at trial indi-

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cated that plaintiff intended her inheritances to be a gift to the marital estate.

3. Divorce and Separation § 161 (NCI4th)— equitable distribution—unequal division—statutory distributional factors—no abuse of discretion

In an action for equitable distribution, the trial court did not abuse its discretion by awarding plaintiff wife only 59% of the marital estate where the court determined that an equal division of marital property was not equitable pursuant to N.C.G.S. § 50-20(c) and it properly considered the statutory factors which were applicable to the parties.

Appeal by plaintiff from orders entered 28 May 1996, 19 July 1996 and 23 July 1996 by Judge Clarence E. Horton, Jr., in Cabarrus County District Court. Heard in the Court of Appeals 30 April 1997.

Ellis M. Bragg for plaintiff appellant.

Ferguson & Scarbrough, P.A., by James E. Scarbrough, for defendant appellee.

COZORT, Judge.

Plaintiff-wife and defendant-husband were granted an absolute divorce on 26 July 1995. Both parties requested equitable distribution of the marital property. The parties' claims for equitable distribution were tried in district court on 13 March 1996, and an equitable distribution judgment was entered in this matter on 28 May 1996. On 5 June 1996, plaintiff requested a new trial on the issue of equitable distribution. Plaintiff based her motion on the ground that the trial was not recorded by a court reporter or by an electronic or other mechanical device. The trial court denied plaintiff's motion, and plaintiff filed notice of appeal to this Court. The central issue in this case is whether a party who does not protest at the time of trial that the trial is not being recorded is entitled to a new trial. Under these circumstances we hold that she is not.

Plaintiff and defendant had been married for almost 45 years. During the marriage, plaintiff inherited substantial sums from the estates of her father and aunt. In 1952, she inherited over \$508,000 in assets from her father; in 1964, she inherited about \$100,000 from her aunt. The parties maintained various checking, savings and brokerage accounts during their marriage. All of plaintiff's inheritances

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were commingled with the funds defendant earned as well as with proceeds from the sales of a succession of homes. During the marriage all of the parties' property was jointly held. Plaintiff did not work outside of the home, and defendant worked the entire marriage until his retirement in 1980. Throughout the course of his employment, defendant earned about \$700,000.

At the time of her trial, plaintiff did not request a court reporter or other mechanical recording of the trial. In addition, plaintiff made no objection that such trial was not being recorded. At trial, the only witnesses were plaintiff and her husband, the defendant. After trial, the court issued an order dividing the marital property with 59% going to the plaintiff-wife and 41% to the defendant-husband. Plaintiff, dissatisfied with the way the property was divided, hired a new lawyer, filed a Rule 59 motion for rehearing and notice of appeal.

In her affidavit in support of her motion for rehearing, plaintiff set forth the errors she maintained the trial court made in its findings of fact. Defendant's trial attorney responded with an affidavit setting forth his recollection of the evidence. At the hearing on the motion, the trial court considered the affidavits and arguments of the parties and ruled that no cause had been shown for relief from judgment on the basis of mistake, inadvertence, surprise or excusable neglect. Plaintiff again filed notice of appeal to this Court. The parties could not agree on the narration of trial evidence to be included in the record on appeal. At a hearing to settle the record on appeal, the trial court ruled that plaintiff's narration of the trial evidence was inaccurate. The court marked deletions and additions to the narration. Plaintiff also took exception to the lower court's order settling the record on appeal.

Plaintiff brings forward eight arguments on appeal. The substance of plaintiff's objections to the trial court's order dividing the marital property and further orders is that the court did not classify the parties' stocks, bonds and bank accounts as plaintiff's separate property. Plaintiff raises this issue in two ways: (1) by arguing that, since the trial was not recorded, no one accurately remembers her testimony that all of these items were purchased with her various inheritances and were never intended to be a gift to defendant; and (2) by arguing that the court erred by classifying these investments as marital property and by giving her a "mere" 59% of the marital estate when her inheritances contributed much more to the marital estate.

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[1] We first address plaintiff's arguments concerning no recording of the trial. N.C. Gen. Stat. § 7A-198(a) (1995) provides that "[c]ourt reporting personnel shall be utilized, if available" and that if court reporting is not available, then electronic devices shall be used. The statute goes on to provide, however, that reporting may be waived. N.C. Gen. Stat. § 7A-198(d). The cases dealing with recordation all indicate that it is not necessarily reversible error for the hearing or trial to go unrecorded. *McAlister v. McAlister*, 14 N.C. App. 159, 187 S.E.2d 449, *cert. denied*, 281 N.C. 315, 188 S.E.2d 898 (1972); *In re Nolen*, 117 N.C. App. 693, 696, 453 S.E.2d 220, 222 (1995).

At trial, appellant never requested a court reporter. In order to preserve a question for appellate review a party must first raise the issue at trial. The complaining party

must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.

N.C.R. App. P. 10(b)(1) (1997). We hold that in district court, where there are no official court reporters, a party seeking recordation of a hearing or trial must request a reporter or mechanical recordation. If the party makes no request, then Rule 10(b)(1) prevents the issue from being raised on appeal. Therefore, we decline to address any of plaintiff's arguments as to recordation, finding she did not properly preserve the issue for appeal.

[2] The essence of plaintiff's remaining assignments make the argument that the parties' investments should have been distributed to plaintiff as her separate property. We affirm the trial court. N.C. Gen. Stat. § 50-20(a) (1995) requires the court to classify the parties' property as marital or separate. N.C. Gen. Stat. § 50-20(b)(2) defines separate property:

"Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance. Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife[,] or both[,] and shall not be considered to be

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marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property.

A trial court's determination that property is to be labeled marital or separate will not be disturbed on appeal if there is competent evidence to support the determination. *Minter v. Minter*, 111 N.C. App. 321, 329, 432 S.E.2d 720, 725, *disc. review denied*, 335 N.C. 176, 438 S.E.2d 201 (1993). We have reviewed the narration of the parties' testimony, the exhibits, and the record on appeal and find that the court did not err in classifying all the parties' investments as marital property.

In *Minter*, defendant-husband presented evidence that he received various inheritances of investment securities. Defendant argued that two stock trading accounts, three bank accounts, commercial real estate, and some personal property purchased during the marriage were purchased with funds from the sale of his inherited stocks. *Id.* at 323-24, 432 S.E.2d at 722. There was no dispute that the contested assets were acquired during the marriage. This Court found that "[o]nce this showing [that the assets were acquired during the marriage] had been made, the burden of proof necessary to show that the assets were marital had been met. The burden therefore shifted to the defendant husband to show that the source of the contested property was separate property[.]" *Id.* at 327, 432 S.E.2d at 724. In *Minter*, defendant testified that he could not trace all of the various assets he inherited to the assets he and his wife owned on the date of separation. *Id.* at 328, 432 S.E.2d at 725. Defendant placed funds from various sources into the various accounts, and from these accounts other investments were purchased, including the other contested assets. *Id.* at 323, 432 S.E.2d at 722. As in *Minter*, the contested assets in the present case were acquired during the marriage. There is competent evidence in the record to support the court's determination that the plaintiff failed to carry her burden of proof to show that the investments of the parties were separate property. Plaintiff was unable to trace her inheritances to the present assets owned jointly by the parties at the time of separation.

In addition, the trial court found that the plaintiff intended her inherited assets to be a gift to the marital estate. This finding is amply supported by the evidence. Our Supreme Court has held that the marital gift presumption is appropriate as an aid in construing N.C. Gen.

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Stat. § 50-20(b)(2). “Donative intent is properly presumed when a spouse uses separate funds to furnish consideration for property titled as an entireties estate.” *McLean v. McLean*, 323 N.C. 543, 551, 374 S.E.2d 376, 381 (1988). This presumption is rebuttable only by clear, cogent, and convincing evidence. *Id.* Plaintiff offered no evidence to rebut the gift presumption. Further the evidence indicates an unmistakable intention on plaintiff’s part to make a gift of her property. The parties kept no separate accounts, commingled the funds received by plaintiff with the earnings and inheritance of defendant, and purchased investment securities in both parties’ names. The parties took vacations, sent their children to private schools, their son to medical school and generally maintained a high standard of living. Portions of plaintiff’s inheritance were used by the parties for all of these expenses.

[3] Finally, plaintiff argues that even if the investment securities are marital property, the contribution of her inheritance to the marital estate should be considered as a “distributional factor.” If it is so considered, plaintiff argues the trial court abused its discretion by awarding her a mere 59% of the marital estate. When a court in its discretion determines that an equal division of marital property is not equitable, N.C. Gen. Stat. § 50-20(c) requires that the court consider the distributional factors set forth in the statute. The trial court’s order sets forth its findings as to all the statutory factors which are applicable to these parties. The parties’ children are grown, and their pensions are vested. The property involved in the Equitable Distribution action was liquid and easy to value. The plaintiff’s arguments as to factors the court failed to consider fall short. We hold the court properly considered all the statutory factors.

Where a trial court has considered and made findings as to each of the specified factors set forth in N.C. Gen. Stat. § 50-20(c), our review is to determine whether the trial court abused its discretion. *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985). We find no abuse here. Based on its findings, the court determined that an unequal division of the marital assets would be equitable and that the plaintiff should receive 59% of the marital estate. The trial court’s orders are

Affirmed.

Judges MARTIN, John C., and McGEE concurred in this opinion prior to 31 July 1997.

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[127 N.C. App. 115 (1997)]

STATE OF NORTH CAROLINA v. ROGER WARD, JOEL SHIRLEY, &
TIMOTHY HARVELL, DEFENDANTS

No. COA96-1205

(Filed 5 August 1997)

1. Appeal and Error § 443 (NCI4th)— assignment of error inadequate—overbroad

An assignment of error was inadequate, but was addressed in the interest of justice, where it encompassed multitudinous areas of law and failed to apprise the Court of Appeals of the legal basis upon which it rested. N.C.R. App. P. 9(a)(1)(k) and 10(c)(1).

2. Appeal and Error § 281 (NCI4th)— appeal from district to superior court—no findings and conclusions in district court—not fatal—trial de novo in superior court

An order of the superior court was reversed and remanded for a *de novo* review and proper evidentiary hearing of the district court's decision dismissing the charges against defendants where criminal summonses were issued alleging that defendants had engaged in an illegal pyramid scheme; defendants moved to dismiss or to remove the prosecutor, alleging prosecutorial misconduct; the charges were dismissed in district court; the State filed notices of appeal, which defendants moved to dismiss; the matter was heard in superior court, where the charges were reinstated and the matter remanded to district court; and defendants brought this appeal. The State's failure to request that the district court make findings of fact and conclusions of law in order to preserve the record on appeal is not fatal because the district court is not a court of record and the superior court's review is *de novo*. However, it is evident from the record that the superior court misapprehended the nature of its review on appeal and failed to hold the necessary hearing for *de novo* review.

3. Appeal and Error § 233 (NCI4th)— appeal by State from district to superior court—notice rather than motion—no prejudice

The State's notice of appeal to superior court from the dismissal in district court of criminal charges relating to a pyramid scheme was sufficient to vest the superior court with jurisdiction. Although defendants contended that the superior court was without jurisdiction because the State filed and served a notice of

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appeal instead of the statutorily required motion, the State specified the legal basis upon which it sought review and copies were filed with the clerk of court and served upon defendants. Defendants can demonstrate and the Court of Appeals could discern no prejudice.

4. Constitutional Law § 226 (NCI4th)— prosecutorial misconduct alleged—charges dismissed in district court—reinstated on appeal to superior court—no attachment of jeopardy

State and federal prohibitions against double jeopardy were not violated where criminal summonses were issued alleging that defendants had engaged in an illegal pyramid scheme; defendants moved to dismiss or to remove the prosecutor, alleging prosecutorial misconduct; the charges were dismissed in district court; and the state filed notices of appeal to superior court, where the charges were reinstated and the matter remanded to district court. The district court entertained pretrial motions to dismiss based upon prosecutorial misconduct and never accepted evidence for an adjudication of guilt. Jeopardy did not attach therein, and did not attach from prosecutorial misconduct because the prosecutor's conduct in this case cannot be said to have been intended to provoke a mistrial.

Appeal by defendants from orders entered 14 August 1996 by Judge Claude S. Sitton in Gaston County Superior Court. Heard in the Court of Appeals 3 June 1997.

Attorney General Michael F. Easley, by Associate Attorney General Melanie L. Vtipil and Assistant Attorney General Gail E. Weis, for the State.

Harkey, Lambeth, Nystrom, Fiorella & Morrison, L.L.P., by Edward A. Fiorella, Jr., Dale S. Morrison, and Jeffrey S. Williams-Tracy, for defendants-appellants.

TIMMONS-GOODSON, Judge.

On or about 1 March 1996 criminal summonses issued for defendants Roger Ward, Joel Shirley and Timothy Harvell (hereinafter collectively referred to as "defendants"), indicating that there was probable cause to believe that defendants "did unlawfully, willfully did [sic] promote and participate in a pyramid [scheme]." Defendants subsequently filed a "Motion to Dismiss, or in the alternative, Motion

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to Remove Prosecutor/Motion to Suppress," wherein they argued that prosecutorial misconduct warranted dismissal of the charges against them, or alternatively, the appointment of an outside prosecutor to handle the matter. The motion further asserted that the court should suppress any evidence discovered during a settlement conference with the Attorney General's Office. Defendants' motion was subsequently heard by Judge Ralph C. Gingles, Jr., in Gaston County District Court on 5 June 1996, and by notation on defendants' criminal summonses, Judge Gingles dismissed the charges against each of the defendants.

On 14 June 1996, the State filed notices of appeal in each case against defendants, wherein the State alleged:

1. There are no written findings of fact that support the decision and Order of dismissal.
2. The reason, stated in open court, of pre-trial publicity and/or prosecutorial misconduct are not legally proper reasons for dismissal of criminal charges without a finding of fact, based upon evidence, that pre-trial publicity was so inflammatory and prejudicial that a fair trial is absolutely precluded, or that prosecutorial misconduct jeopardized the right of the defendant to a fair trial, when the Court made no attempt to use traditional means of protection of a defendant's right to a fair trial before dismissing the criminal charges.

Defendants filed a joint motion to dismiss the appeal on 2 August 1996. This matter came on for hearing before Judge Claude S. Sitton during the 2 August 1996 criminal session of Gaston County Superior Court. After hearing the arguments of counsel, Judge Sitton entered an order, on 14 August 1996, reinstating the criminal charges against each of the defendants and remanding the matter to the district court for further proceedings. Defendants appeal.

[1] At the outset, we note that defendants present but one assignment of error:

Defendants assign as error the Orders of Superior Court Judge Sitton, signed on August 2, 1996, and filed on August 16 [sic], 1996, sitting as an Appellate Court and in review of the June 5, 1996, Order of the District Court of Gaston County, North Carolina, which reinstated the charges against Defendants Ward, Shirley and Harvell, and remanded their cases to the District Court for further proceedings.

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This assignment of error is woefully inadequate. Not only is the assignment of error overbroad, encompassing multitudinous areas of law, it also fails to apprise this Court of the legal basis(es) upon which this assignment of error rests. These inadequacies are in violation of Rules 9(a)(1k) and 10(c)(1) of the North Carolina Rules of Appellate Procedure, and as such, this assignment of error may be summarily overruled. See N.C.R. App. P. 9, 10; *State v. McCoy*, 303 N.C. 1, 277 S.E.2d 515 (1981). However, pursuant to Rule 2 of the Rules of Appellate Procedure, we, in the interest of justice, choose to address the merits of defendants' appeal.

[2] On appeal, defendants present the following arguments:

- (1) The superior court erred in reinstating the criminal charges against defendants and remanding the cases to district court for further proceedings, since the State failed to preserve the record on appeal;
- (2) The superior court did not find as a matter of law that the district court's orders dismissing the criminal charges against them was in error, and thus, did not have authority to reinstate the charges and remand the case to district court for further findings;
- (3) The superior court ignored the State's assignments of error on appeal and based its orders on an issue not raised by either party;
- (4) The State did not file a written motion as required by section 15A-1432(b) of the North Carolina General Statutes, and therefore, the superior court did not obtain jurisdiction and the orders of the court are void; and
- (5) The rule against double jeopardy prohibited the superior court from hearing the State's appeal of the district court's order dismissing criminal charges against them.

For the reasons discussed herein, we find defendants' second argument meritorious. We, therefore, reverse the order of the superior court and remand this matter for *de novo* review and proper evidentiary hearing of the district court's decision dismissing the charges against defendants.

First, as to defendants' argument that the State's failure to preserve the record on appeal, i.e., request the district court to make

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findings of fact and conclusions of law, we do not find favorably. Section 15A-1432 of the North Carolina General Statutes provides in pertinent part:

(a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the district court judge to the superior court:

(1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.

N.C. Gen. Stat. § 15A-1432 (1988). In *State v. Gurganus*, this Court provided guidance as to the scope of review by the superior court upon appeal from district court. 71 N.C. App. 95, 321 S.E.2d 923 (1984). In *Gurganus*, the defendants contended that in reviewing orders of dismissal pursuant to section 15A-1432 of the General Statutes, the superior court judge acts as an appellate court judge and, thus, was bound by the district court judge's findings of fact if they were supported by competent evidence. *Id.* at 98-99, 321 S.E.2d at 925. In response, this Court stated:

District Criminal Courts are not courts of record. There would be no method for determining whether the findings of fact in the District Court order were supported by "any competent evidence," the applicable standard of the Superior Court if acting as an appellate court. Therefore, in many instances an evidentiary hearing may be the only method by which the Superior Court Judge can carry out the mandate of G.S. 15A-1432(d) and (e) and determine whether the District Court ruling was proper.

Id. at 99, 321 S.E.2d at 925-26. Because of the difference in practice between the appellate court and the superior court, their reviewing roles must also differ. *Id.* at 99, 321 S.E.2d at 926. Hence, on appeal to superior court, the hearing pursuant to section 15A-1432 "is limited to a *de novo* review of the District Court's order dismissing criminal charges against a defendant or granting a motion for a new trial based on newly discovered evidence." *Id.*

As the district court is not a court of record, and the superior court's review is *de novo*, the State's failure to request that the district court make findings of fact and conclusions of law in order to preserve the record on appeal is not fatal. Defendants' arguments to the contrary fail.

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Defendants' second contention that the superior court lacked authority to reinstate the charges against them and remand the case to district court for further proceedings, is well taken. In the instant case, the superior court was presented with a *de novo* appeal of the district court's dismissal of the charges against each of the defendants. It is evident from the record that the superior court misapprehended the nature of that court's review on appeal; and failed to hold the necessary hearing for *de novo* review in this case. As such, the order reinstating the charges against each of the defendants and remanding this action to district court for further findings was error and must be reversed. Moreover, the matter must be remanded to the superior court with instructions that a *de novo* hearing be conducted, with an order affirming or reversing the district court's dismissal to be subsequently entered. In light of our decision on this issue, we need not address defendants' third argument on appeal.

[3] We do, however, address defendants' fourth argument on appeal, wherein defendants contend that since the State filed and served a document entitled "Notice of Appeal," instead of a "motion" as required by North Carolina General Statutes section 15A-1432(b), the superior court was without jurisdiction to hear the State's appeal to that court. We do not agree.

A party who assigns error on appeal, must also show prejudice in order to prevail. *State v. Billups*, 301 N.C. 607, 272 S.E.2d 842 (1981). Section 15A-1432(b) of the General Statutes provides in pertinent part,

When the State appeals pursuant to subsection (a) the appeal is by written motion specifying the basis of the appeal made within 10 days after the entry of the judgment in the district court. The motion must be filed with the clerk and a copy served upon the defendant.

N.C.G.S. § 15A-1432(b).

In the case presently before us, the State filed written "Notice[s] of Appeal." Therein, the State specified the legal bases upon which it sought review, as required by section 15A-1432(b). Further, copies of the "Notice[s] of Appeal" were filed with the clerk of court and copies were served upon defendants. While defendants may encourage us to exalt form over substance, we will not do so. As the "Notice[s] of Appeal" properly gave notice to defendants of the grounds upon which the State's appeal was based, defendant can demonstrate and

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we discern no prejudice in the labeling of the document as a "Notice of Appeal" instead of a "motion." Hence, the State's "Notice[s] of Appeal" were sufficient to vest the superior court with jurisdiction to hear this matter.

[4] Finally, defendants argue that federal and state prohibitions against double jeopardy prevent the superior court from hearing the State's appeal in this case. In fact, defendants argue that section 15A-1432(a) of our General Statutes has some threshold prerequisite, which requires the State to show that the appeal was not prohibited by the rule against double jeopardy. Again, we cannot agree.

The Fifth Amendment to the United States Constitution guarantees the right of criminal defendants to be free from double jeopardy. U.S. Const. amend. V. It " 'protects against a second prosecution for the same offense after acquittal; . . . against a second prosecution for the same offense after conviction; . . . [and] against multiple punishments for the same offense.' " *State v. Oliver*, 343 N.C. 202, 205, 470 S.E.2d 16, 18 (1996). This right has been made applicable to the states through the Fourteenth Amendment. *State v. Perry*, 52 N.C. App. 48, 55, 278 S.E.2d 273, 279 (1981), *aff'd in part and modified in part on other grounds*, 305 N.C. 225, 287 S.E.2d 810 (1982). Moreover, the Law of the Land Clause provides similar protections under the North Carolina Constitution. See N.C. Const. art. I, § 19. It is well-settled that in non-jury trials, jeopardy does not attach until the court begins to hear evidence or testimony. *State v. Brunson*, 327 N.C. 244, 245, 393 S.E.2d 860, 861-62 (1990). This rule is premised upon the proposition that the potential for conviction exists when evidence or testimony against a defendant is presented to and accepted by the court. *Id.* at 250, 393 S.E.2d at 865.

In the case *sub judice*, evidence was never accepted by the district court for an adjudication of defendants' guilt. Instead, the record tends to show that the district court entertained defendants' pretrial motions to dismiss based upon prosecutorial misconduct, hearing arguments of the State and each of the defendants. Therein, jeopardy did not attach. As jeopardy did not attach, it necessarily follows that state and federal prohibitions against double jeopardy were not violated.

Moreover, defendants' argument that in this action, prosecutorial misconduct alone warrants a finding that reinstatement of charges against them constitutes double jeopardy is without merit. In *State v.*

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White, 322 N.C. 506, 369 S.E.2d 813 (1988), our Supreme Court adopted the federal test for determining whether retrial is barred after a mistrial because of prosecutorial misconduct. Therein, the Supreme Court stated, "Where the defendant makes [a motion for mistrial] because of prosecutorial misconduct, and the court grants the motion, retrial is not barred by Article I, Section 19 unless the defendant shows that the prosecutor was motivated by the intent to provoke a mistrial instead of merely the intent to prejudice the defendant." *Id.* at 511, 369 S.E.2d at 815. Again, as there has been no trial on the merits in the present case, jeopardy has not attached. Moreover, the State's bad faith in seeking to admit documents and information obtained during settlement negotiations between defendants and the Attorney General's Office, and pretrial publicity sought in contravention with representations of the District Attorney's Office, cannot be said to have been intended to provoke a mistrial. Defendants arguments to the contrary are unpersuasive.

In view of our finding that the State's appeal to the superior court did not violate state and federal prohibitions against double jeopardy, defendants' argument that the State's appeal was erroneously heard by the superior court, without a proper showing by the State that said appeal was not prohibited by the double jeopardy clause, is moot.

In light of the foregoing, the decision of the superior court is reversed, and the matter remanded to the superior court for *de novo* review as to defendants' motions to dismiss the charges against each of them.

Reversed and remanded.

Judges COZORT and MARTIN, Mark D., concur.

Judge COZORT concurred prior to 31 July 1997.

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[127 N.C. App. 123 (1997)]

HARTFORD FIRE INSURANCE COMPANY, PLAINTIFF v. LARRY N. PIERCE AND
CHARLES W. SETLIFF, DEFENDANTS

No. COA 96-899

(Filed 5 August 1997)

**Insurance § 485 (NCI4th)—handgun transported in vehicle—
accidental firing—injury of passenger—use of vehicle—
coverage by liability insurance**

An automobile liability policy covered injuries sustained by a passenger in a vehicle driven by the insured's employee when a handgun that the employee routinely transported in the vehicle and stored in the glove box of the vehicle accidentally fired while the employee was removing it from its holster since transportation of the handgun was an ordinary and customary "use" of the vehicle, and there was thus a causal connection between "use" of the vehicle and the accident. This result is not changed by the fact that the insured's employee was intoxicated when the accident occurred.

Judge MARTIN, John C., dissenting.

Appeal by defendant Larry N. Pierce from summary judgment entered 9 May 1996 by Judge Julius A. Rousseau, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 2 April 1997.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnson, Jr., for plaintiff-appellee.

Donaldson & Horsley, P.A., by Jeffrey K. Peraldo, for defendant-appellant.

McGEE, Judge.

Plaintiff Hartford Fire Insurance Company filed a complaint seeking declaratory judgment to determine its obligations under an automobile liability insurance policy issued to CMS Trading Company, Inc., the employer of defendant Charles W. Setliff. Setliff accidentally shot and injured defendant Larry N. Pierce while Setliff was a passenger in a vehicle owned by CMS, which was being driven by defendant Pierce. The CMS vehicle was insured under a policy issued by plaintiff. In its complaint, plaintiff asserts that its policy does not cover the injuries sustained by Pierce. Pierce filed a motion for sum-

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mary judgment, arguing there is no genuine issue as to any material fact and that he is entitled to judgment in his favor as a matter of law. The trial court found no genuine issue of material fact and ruled plaintiff is entitled to summary judgment as a matter of law.

"We note at the outset that summary judgment can be appropriate in an action for a declaratory judgment where there is no genuine issue of material fact and one of the parties is entitled to judgment as a matter of law." *N.C. Association of ABC Boards v. Hunt*, 76 N.C. App. 290, 292, 332 S.E.2d 693, 694 (1985). "Summary judgment in favor of the non-movant is appropriate when the evidence presented demonstrates that no material issues of fact are in dispute, and the non-movant is entitled to entry of judgment as a matter of law." *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 212, 258 S.E.2d 444, 447-48 (1979). In this case summary judgment for the non-movant plaintiff is not appropriate; however, summary judgment is appropriate for defendant Pierce.

Plaintiff's policy covers "all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'" N.C. Gen. Stat. § 20-279.21(b)(2) (1993) requires that such policies provide coverage for "persons in lawful possession [of the insured vehicle] against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle."

In *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 539-40, 350 S.E.2d 66, 69 (1986), our Supreme Court stated the test for determining when coverage is provided:

There must be a causal connection between the use and the injury. This causal connection may be shown to be an injury which is the natural and reasonable incident or consequence of the use, though not foreseen or expected, but the injury cannot be said to arise out of the use of an automobile if it was directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of the automobile. (Citation omitted).

In short, the test for determining whether an automobile liability policy provides coverage for an accident is not whether the

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automobile was a proximate cause of the accident. Instead, the test is whether there is a causal connection between the use of the automobile and the accident.

(Citations omitted).

In *State Capital*, a rifle had been placed in the storage area behind the seat in a pickup truck and had accidentally discharged when the insured started to remove it from the storage area. When the rifle fired, a bullet struck a man standing near the truck. The *State Capital* court held the insured's automobile liability policy covered the victim's injuries. In finding a causal connection between the use of the vehicle and the accident, the *State Capital* court noted that the insured customarily transported a firearm and stored it in the storage area behind the seat. Under those facts, the *State Capital* court found that transportation of the firearm was an ordinary and customary use of the motor vehicle. Similarly, in this case, the insured's employee Setliff routinely transported a handgun, storing it in the glove box of his truck. The gun accidentally fired while Setliff was removing it from its holster. We conclude the trial court should have entered summary judgment in favor of defendant Pierce.

Our decision is further supported by *Reliance Insurance Co. v. Walker*, 33 N.C. App. 15, 234 S.E.2d 206 (1977). In *Reliance*, a gun stored on a gun rack in a pickup truck accidentally fired, injuring a man standing nearby. The *Reliance* court noted that the gun rack was mounted in the truck's cab and had been frequently used to transport rifles. The *Reliance* court concluded,

Clearly, the transportation of guns was one of the uses to which the truck had been put. Thus, the shooting was a "natural and reasonable incident or consequence of the use" of the truck and was not the result of something "wholly disassociated from, independent of, and remote from" the truck's normal use.

Reliance at 22, 234 S.E.2d at 211.

Plaintiff directs this Court's attention to five other North Carolina cases involving the question of insurance coverage in instances of gunshot injuries associated with motor vehicles. Plaintiff asserts these cases support a judgment in plaintiff's favor. We do not agree.

Three of the cases cited by plaintiff involve deliberate, not accidental, shootings and thus are inapplicable to this case. Plaintiff also cites *Nationwide Mutual Insurance Company v. Rochelle*, North

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Carolina Court of Appeals, No. 913SC977, an unpublished opinion by this Court. Under N.C.R. App. P. 30(e)(3),

[a] decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered.

Even if *Nationwide* had precedential value, however, it would not apply to this case. In *Nationwide*, a hunter sitting in his truck shot and killed a man he had mistaken for a deer. The *Nationwide* court denied insurance coverage, observing, “Rochelle deliberately held the rifle, aimed it and purposely fired it while sitting in the parked truck. No transportation was occurring when he injured intestate.”

Plaintiff further cites *Raines v. Insurance Co.*, 9 N.C. App. 27, 175 S.E.2d 299 (1970), but *Raines*, too, is inapplicable to this case. In *Raines*, the car was parked, the motor was off and one door was open. *Nationwide* and *Raines* do not address whether the vehicle at issue was routinely used to transport a weapon. The *Reliance* court noted that fact in rejecting *Raines* as controlling authority, and we do likewise. “There was nothing in *Raines* to indicate that the car was or ever had been used for transportation of guns.” *Reliance*, 33 N.C. App. at 23, 234 S.E.2d at 211.

Plaintiff also points out that Setliff was intoxicated at the time the gun accidentally fired. Setliff’s intoxication does not change the fundamental facts that Setliff was employed by the insured, he was riding in a covered vehicle and he routinely transported a handgun that he deemed necessary for his protection.

Under such circumstances, we follow established rules of construction for interpreting the provisions of insurance policies.

Provisions . . . “which extend coverage must be construed liberally so as to provide coverage, whenever possible by reasonable construction.” It is also well settled that when an insurance policy contains no ambiguity, it shall be construed according to its terms, but when ambiguity exists the policy shall be construed in favor of coverage and against the insurer who selected its language.

N.C. Farm Bureau Mut. Ins. Co. v. Stox, 330 N.C. 697, 707, 412 S.E.2d 318, 324-25 (1992) (citations omitted).

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For the reasons stated, we reverse summary judgment for plaintiff and remand with direction to enter summary judgment for defendant Larry N. Pierce on the issue of coverage.

Reversed and remanded.

Judge COZORT concurs.

Judge MARTIN, John C., dissents.

Judge Cozort participated in this opinion prior to his resignation 31 July 1997.

Judge MARTIN, John C., dissenting.

I respectfully dissent. Citing *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 350 S.E.2d 66 (1986), the majority concludes there was a casual connection between the use of the CMS vehicle and defendant Pierce's injury because (1) Setliff routinely carried a pistol for his personal protection in the glove box of the CMS company truck, and (2) Pierce's injury occurred when "[t]he gun accidentally fired while Setliff was removing it from its holster." However, I believe a close reading of the *State Capital* decision and the facts in this case indicates a result different from the majority's holding.

In *State Capital*, two men had gone hunting in a truck belonging to one of them. They stored their hunting rifles and shotgun in a gun rack and in a storage area behind the seat. One of the men was injured when a rifle discharged as his companion, having spotted a deer, attempted to remove the rifle from the storage space. The Supreme Court found a casual connection between the use of the truck and the injury.

The transportation of firearms is an ordinary and customary use of a motor vehicle, especially pickup trucks. In addition, use of an automobile includes its loading and unloading. In the case *sub judice*, Anderson transported his .30-30 rifle in his pickup truck; as he attempted to unload the rifle from the truck, it discharged, causing injury to McKinnon. Since the transportation and unloading of firearms are ordinary and customary uses of a motor vehicle, and the injury-causing accident here resulted from the unloading of a transported rifle, such injuries were a natural and

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reasonable incident or consequence of the use of the motor vehicle (citation omitted).

The shooting in the case *sub judice* was an incident or consequence of the use of an automobile and not the result of some independent act disassociated from the use of an automobile.

State Capital, at 540, 350 S.E.2d at 69-70.

In the present case, the facts establish no such causal connection between the use of the CMS vehicle and the injury. Although Setliff routinely carried a pistol in the vehicle for his own protection, the evidence establishes that the injury occurred as a result of his reckless conduct in engaging in horseplay with the firearm, rather than as a reasonable consequence of the use of the truck. Contrary to the majority's recitation, there was no competent evidence before the trial court that the pistol discharged as it was being removed from its holster. Defendant Pierce's affidavit states that:

Setliff asked me if I wanted to see a pistol that he apparently had removed from the glove box of the CMS truck. I could hear him cocking the gun repeatedly. Because he was so drunk, I asked him to stop playing with the gun and to put the gun away. The gun then discharged and I was shot in the leg.

Setliff acknowledged, at his deposition, that he was so intoxicated at the time that he does not remember how the pistol came to be in his hand or any of the events surrounding its discharge. In my view, horseplay involving firearms is neither an ordinary nor customary use of a motor vehicle and, therefore, is not reasonably incidental to the use of a motor vehicle within the contemplation of either party to an automobile liability insurance policy or within the contemplation of the General Assembly in enacting G.S. § 20-279.21(b)(2), the compulsory motor vehicle liability insurance statute. Thus, I would hold that Pierce's injury was not a reasonable consequence of the use of the CMS vehicle, but resulted from Setliff's reckless act "wholly disassociated" from the truck's normal use; as such it was not covered by plaintiff's automobile liability insurance policy. I vote to affirm the judgment of the trial court.

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STATE OF NORTH CAROLINA v. JOE LOUIS WILSON, DEFENDANT

No. COA96-564

(Filed 5 August 1997)

Constitutional Law § 172 (NCI4th)— selling alcoholic beverage to underage person—civil penalty—criminal conviction—not double jeopardy

The trial court erred in dismissing criminal charges against defendant for selling an alcoholic beverage to a person under the statutory age in violation of N.C.G.S. § 18B-302(a) where defendant's \$400.00 civil penalty resulting from an administrative proceeding against defendant before the ABC Commission and arising from the same offense did not constitute punishment for the purpose of the Double Jeopardy Clause.

Appeal by State from order entered 19 February 1996 by Judge J.B. Allen, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 18 February 1997.

Attorney General Michael F. Easley, by Special Deputy Attorneys General Robin P. Pendergraft and Isaac T. Avery, III, for the State.

Hunt and White, by George Hunt and Andrew Hanford, for defendant-appellee.

JOHN, Judge.

The State appeals the trial court's dismissal of the charge against defendant of selling an alcoholic beverage to a person under the statutory age in violation of N.C.G.S. § 18B-302(a) (1995). The State argues the court erred in its determination defendant would be exposed to double jeopardy if tried for the offense by virtue of having previously been punished for the same conduct in an administrative proceeding. We conclude the trial court was in error and reverse.

Pertinent facts and procedural history are as follows: Defendant, trading as Joe's Shopwell Mini Mart in Burlington, was holder of off-premise Malt Beverage, Fortified Wine and Unfortified Wine permits issued by the North Carolina Alcoholic Beverage Control (ABC) Commission (the Commission). On 20 May 1995, defendant was charged by an Alcohol Law Enforcement agent with selling a malt

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beverage to a person under the age of twenty-one in violation of G.S. § 18B-302(a)(1). Following defendant's arrest, he was notified by the Commission that a complaint had been filed against him as a permittee alleging defendant or his agent had violated state ABC laws.

In response to the complaint, defendant tendered an offer of compromise dated 7 August 1995 wherein he stipulated and agreed that on 20 May 1995 an employee of the permittee had sold a malt beverage on the licensed premises to a person less than 21 years of age. In turn, the Commission issued a Final Agency Decision/Order of Compromise on 8 September 1995 setting out defendant's stipulation, suspending his permits for a period of fifteen days, and providing that, upon payment of \$400.00, "said 15 day suspension will be suspended for a period of one year on the condition that [defendant and his employees] not further violate the [ABC] laws." Defendant paid \$400 to the Commission pursuant to this order.

Defendant's criminal matter came on to be heard 4 October 1995 in Alamance County District Court. Upon defendant's motion, the charge against him was dismissed on grounds of double jeopardy. On appeal by the State, the Superior Court likewise concluded in pertinent part:

(3) That the defendant's payment of a \$400.00 administrative penalty to the Alcoholic Beverage Control Commission prior to the trial of this action is punishment for double jeopardy purposes;

(4) That the prosecution of the Defendant for a violation of the criminal law would constitute double jeopardy and this criminal prosecution must be dismissed.

The State gave timely notice of appeal to this Court.

Defendant contended in the trial court that the Double Jeopardy Clause of the United States Constitution and the Law of the Land Clause of our North Carolina Constitution prohibited his conviction for selling alcohol to a minor because he previously had been punished for the same offense in an administrative proceeding. The Double Jeopardy Clause, contained in the Fifth Amendment to the federal constitution,

protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same

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offense after conviction. And it protects against multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 664-65 (1969), companion case overruled on other grounds, 490 U.S. 794, 104 L. Ed. 2d 865 (1989) (footnotes omitted). The Law of the Land Clause of our North Carolina Constitution, Art. I, § 19, incorporates similar protections. *State v. Oliver*, 343 N.C. 202, 205, 470 S.E.2d 16, 18 (1996).

In *United States v. Halper*, 490 U.S. 435, 104 L. Ed. 2d 487 (1989), the United States Supreme Court held that civil penalties under certain circumstances may constitute punishment for purposes of double jeopardy analysis.

[I]n determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated.

Id. at 447 n.7, 104 L. Ed. 2d at 501 n.7. The Court observed that “a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment,” *id.* at 448, 104 L. Ed. 2d at 501, and went on to hold that

a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution,

id. at 448-49, 104 L. Ed. 2d at 502.

Halper made clear that double jeopardy analysis concerning a particular civil fine consists of balancing the amount of the penalty with the loss the government has suffered due to the unlawful actions of the person fined; if an offender’s sanction is “overwhelmingly disproportionate to the damages he has caused,” the penalty constitutes punishment for purposes of the Double Jeopardy Clause. *Id.* at 449, 104 L. Ed. 2d at 502.

“We acknowledge that this inquiry will not be an exact pursuit,” the Court wrote, as “the precise amount of the Government’s damages and costs may prove to be difficult, if not impossible, to ascertain.” *Id.* In recognition of this fact, the Court also observed:

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[T]he Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis.

Id. at 446, 104 L. Ed. 2d at 500.

Further, should a particular civil penalty “bear[] no rational relation to the goal of compensating the Government for its loss,” then “the defendant is entitled to an accounting of the Government’s damages and costs” to enable the trial court “to determine if the penalty sought in fact constitutes a second punishment.” *Id.* at 449-50, 104 L. Ed. 2d at 502. Ultimately,

the trial court [is left] the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment.

Id. at 450, 104 L. Ed. 2d at 502-3.

Turning to the case *sub judice*, we note the North Carolina Supreme Court has twice previously ruled that proceedings conducted by the Commission (or, more precisely, its predecessor, the State Board of Alcoholic Control) against violators of the ABC laws are civil in nature. *See Freeman v. Board of Alcoholic Control*, 264 N.C. 320, 323-24, 141 S.E.2d 499, 502 (1965); *Boyd v. Allen*, 246 N.C. 150, 154, 97 S.E.2d 864, 867 (1957).

In addition, concerning whether the fine at issue bore a “rational relation to the goal of compensating the Government for its loss,” *Halper*, 490 U.S. at 449, 104 L. Ed. 2d at 502, the State in its brief asserts the following:

Although the record contains no findings regard[ing] the number of hours spent on this case by ALE agents, the ABC attorney, their support staffs, and the ABC Commission members themselves, we venture to say that \$400.00 barely covers the cost of investigating this violation, filing the necessary reports and documents, negotiating a settlement and formally presenting this matter for final decision before the ABC Commission.

We must agree.

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Without doubt, the better practice would have been for the trial court to enter in the record its own conclusion on the issue of whether the \$400.00 fine paid by defendant bore a "rational relation," *Halper*, 490 U.S. at 449, 104 L. Ed. 2d at 502, to the goal of compensating the Commission and the State. However, bearing in mind the Supreme Court's recognition that "rough justice" is involved in such a determination, *id.* at 446, 104 L. Ed. 2d at 500, it cannot fairly be said that a \$400 penalty for violation of the ABC laws did not "remotely approximate," *id.*, the governmental costs of investigating and bringing an action against defendant. See *In re Bruce*, 103 N.C. App. 81, 83, 404 S.E.2d 480, 481-82 (1991) (even absent evidence of state's actual loss, Court concluded Board of Registration For Professional Engineers and Land Surveyors' fine of \$500 against petitioner was related to Board's regulation of the subject professions, and thus remedial); see also *Ex Parte State Alcoholic Bev. Control Bd.*, 654 So.2d 1149 (Ala. 1994) (\$500 fine rationally related to state's cost of regulating ABC licensees); but see *Crump v. Alcoholic Beverage Control Bd.*, 678 So.2d 133 (Ala. Civ. App. 1995), *cert. denied*, 678 So.2d 140 (Ala. 1996) (\$1000 fine constituted punishment in view of punitive purpose underlying ABC penalties); compare *Halper*, 490 U.S. at 452, 104 L. Ed. 2d at 504 (Supreme Court agreed with trial court that fine of more than \$130,000 to compensate government for estimated \$16,000 in costs was "sufficiently disproportionate" to constitute punishment). Accordingly, remand to the trial court to enter its determination in the record prior to our decision herein would serve no useful purpose, particularly from the point of view of judicial economy.

In sum, the civil penalty resulting from the administrative proceeding against defendant did not constitute punishment for the purpose of the Double Jeopardy Clause. Defendant thus did not face a second punishment when charged with violation of G.S. § 18B-302(a) after having previously reached a compromise settlement pursuant to G.S. § 18B-104 based upon a complaint arising out of the same conduct. Because the trial court found to the contrary on this single ground, we reverse.

Reversed.

Judges EAGLES and COZORT concur.

Judge COZORT concurred prior to 31 July 1997.

MINTER v. OSBORNE CO.

[127 N.C. App. 134 (1997)]

DAVID R. MINTER, EMPLOYEE, PLAINTIFF v. OSBORNE COMPANY, EMPLOYER,
SELF-INSURED, (KEY RISK MANAGEMENT SERVICE), DEFENDANTS

No. COA 96-1220

(Filed 5 August 1997)

**1. Workers' Compensation § 113 (NCI4th)— insect sting—
injury arising out of employment—increased risk test**

The increased risk test is the appropriate test for determining whether an employee's injuries from an insect sting arose out of his employment.

**2. Workers' Compensation § 114 (NCI4th)— insect sting—not
injury arising out of employment**

Plaintiff failed to show that an insect sting he received while working as a carpenter for defendant employer was an accident or injury arising out of his employment because he failed to show that he was at an increased risk of being stung than a member of the public. Although the record contains statements by plaintiff's coworkers that fresh wood attracts stinging insects or bees, there was no evidence as to what type of insect stung plaintiff or that he was working with fresh wood.

Appeal by defendants from the opinion and award filed by the Industrial Commission on 24 May 1996. Heard in the Court of Appeals 30 April 1997.

Donaldson & Horsley, P.A., by Fredrick W. Evans, for plaintiff appellee.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr., for defendant appellants.

COZORT, Judge.

Plaintiff-employee was stung by an insect while working for defendant-employer. After hospital treatment, plaintiff suffered obstructive coronary artery disease. The Industrial Commission held that the sting was an injury by accident and directed defendant insurer to pay all medical expenses, including angioplasty. We find no compensable injury, and we reverse.

The evidence presented at the hearing before the Deputy Commissioner shows the following. On or about 30 August 1993,

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plaintiff David Minter began work as a carpenter for defendant construction company. On 8 December 1993, Minter was stung by an insect while working on the roof at a job site. Plaintiff reported this sting to his supervisor and was taken to the doctor's office. Plaintiff is allergic to bee stings, and at the doctor's office, he was given epinephrine and Benadryl. At some point, plaintiff began complaining of chest pain and was transported to a hospital. Plaintiff was treated and released. Plaintiff returned later with increased swelling and chest pain and was admitted to the hospital.

At the hospital, diagnostic tests revealed that plaintiff had obstructive coronary artery disease. Plaintiff subsequently underwent surgery to remove this blockage. On 20 January 1994, Minter made a claim for workers' compensation benefits.

The Industrial Commission found that plaintiff "sustained an injury by accident arising out of and in the course of his employment with defendant-employer materially aggravat[ing] his pre-existing coronary artery disease for the worse." Plaintiff was awarded temporary total disability, and defendant was also directed to pay "all reasonable medical expenses incurred or to be incurred as the result of plaintiff's injury by accident on 8 December 1994 and the aggravation thereby of his coronary artery disease." Commissioner Dianne C. Sellers dissented, opining that plaintiff's "injury did not arise out of his employment with defendant since plaintiff's employment did not place him at a greater risk of sustaining an insect bite or sting than the public generally." Defendants appeal.

Defendants first contend that plaintiff's injury did not arise out of his employment. We agree.

To be compensable, an insect sting must be an injury by accident which arose out of and in the course of plaintiff's employment. N.C. Gen. Stat. § 97-2(6) (1996 Cum. Supp.). Finding no published North Carolina cases on insect bites or stings with respect to compensability under workers' compensation claims, we turn to cases from other jurisdictions for guidance.

The jurisdictions which have addressed this issue have considered it in terms of the risk of insect bite to which the employee is exposed due to his employment. In *Renshaw v. Merrigol-Adler Bakery*, 212 Neb. 662, 325 N.W.2d 46 (1982), the Nebraska Supreme Court held that the employee could not recover workers' compensation benefits because he had not shown that he was at greater

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risk of being stung than the risk to which the general public is exposed. In *Dawson v. A & H Mfg. Co.*, 463 A.2d 519 (R.I. 1983), the Rhode Island Supreme Court affirmed the Commission's denial of benefits where there was no evidence regarding the nexus between the employee's sting and his employment as a stock boy. The Rhode Island court adopted an actual risk test where the employee was required to show that the risk of sting, even though common to the public, was in fact a risk of his employment. *Id.* at 521. In his commentary regarding the *Dawson* case, Professor Lex Larson describes the test the court applied as indistinguishable from the increased risk test. 1 A. Larson & L. Larson, *Larson's Workers' Compensation Law* § 8.6 (1996).

The case upon which our Commission relied is *Poinsetta Gifts v. Evans*, 393 So. 2d 8 (Fla. Dist. Ct. App. 1980). In that case the Florida Industrial Commission awarded compensation for an employee who was hypersensitive to bees. The award was affirmed per curiam without an opinion. In the accompanying dissenting opinion is a statement to the effect that the majority affirmed the award because the employee was at work when she was stung; therefore, her work placed her in a position of risk. *Id.* at 9. We find our Commission's reliance on this case is misplaced. Under other areas of workers' compensation law our Supreme Court has rejected the positional risk doctrine. See *Roberts v. Burlington Industries*, 321 N.C. 350, 358, 364 S.E.2d 417, 423 (1988) (employee traveling home from business trip killed when he attempted to assist an injured pedestrian was not an injury arising out of course of employment).

[1] The test our courts have used in similar situations to determine whether the injury arose out of employment is the increased risk test. We adopt the increased risk test for this case. In *Pope v. Goodson*, 249 N.C. 690, 107 S.E.2d 524 (1959), our Supreme Court applied the increased risk test to an employee who was struck by lightning. The court found the evidence showed that

Pope, when killed by lightning, by reason of his employment had on wet clothes, and had tied around his waist a nail apron containing nails, and that these circumstances, incidental to his employment, peculiarly exposed him to a risk of injury from lightning greater than that of other persons in the community. Such being the case his death is compensable under our Workmen's Compensation Act as an injury by accident arising out of and in the course of his employment.

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Id. at 698, 107 S.E.2d at 529-30. *See also*, *Dillingham v. Yeargin Construction Co.*, 320 N.C. 499, 358 S.E.2d 380, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 84 (1987) (applied increased risk test to employee who suffered cardiac arrest while wearing heavy radiation suit in high temperature workplace); *Culpepper v. Fairfield Sapphire Valley*, 93 N.C. App. 242, 248-49, 377 S.E.2d 777, 781-82, *aff'd*, 325 N.C. 702, 386 S.E.2d 174 (1989) (cocktail waitress' employment placed her at increased risk of sexual assault not shared by general public). The increased risk test is also incorporated into the Workers' Compensation statute in regards to occupational diseases. N.C. Gen. Stat. § 97-53(13) (1991) excludes from occupational diseases those to which the general public "is equally exposed outside of the employment."

Having determined the increased risk test is the appropriate test for ascertaining whether an employee's injuries from an insect sting arose out of his employment, we now apply it to the present case. Our standard of review is whether the Commission's findings are supported by any competent evidence in the record and whether the findings support its conclusions. *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980).

[2] Central to this case is the Commission's finding number seven:

On the day plaintiff was stung on 8 December 1993, he was working with freshly cut wood on the construction site. Bees and other types of insects are attracted to and may gather on or around freshly cut wood. The Full Commission finds that there is credible evidence in the record that bees had been seen earlier on the day in question in the area where plaintiff and others were working.

Based on this finding the Commission concluded that, "On 8 December 1994 [*sic*] plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer materially aggravated [*sic*] his pre-existing coronary artery disease for the worse."

We find no competent evidence in the record to support finding number seven, which precludes the use of the finding to support the Commission's conclusion. First, Minter offered no evidence as to what type of insect stung him. At the hospital and at the hearing before the Deputy Commissioner, Minter indicated that he was

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allergic to bees. Dr. James Austin, who treated Minter in the emergency room on 8 December 1993, initially diagnosed Minter with an allergic reaction to a "bee/insect sting." Furthermore, we have reviewed the record on appeal and transcript and find that there is no evidence that Minter was working with "green" or "fresh wood."

The record contains some reference by plaintiff's coworkers that fresh wood attracts some sort of stinging insect. At the hearing before the Deputy Commissioner, construction worker Jerry Younger stated that "new lumber will draw yellow jackets." Plaintiff's exhibit number ten, offered at the hearing, contains the transcription of an unsworn telephone conversation between plaintiff's supervisor and an insurance adjuster. In this conversation, there is some reference to new wood and lumber attracting bees. This evidence is not competent or credible and cannot support the finding that "[b]ees and other types of insects are attracted to and may gather around freshly cut wood." Minter offered no expert testimony regarding bees or other insects, their propensity to gather around any area, or that they would be present in December. Furthermore, Younger testified that he believed he was "more likely to get stung off the job than on the job."

Even if we were to find that plaintiff's coworker's unsworn statement was competent and credible evidence, there is still no evidence that plaintiff was stung by a yellow jacket or a bee or that he was working with fresh wood. We simply cannot rely on unsworn, unsupported and incompetent statements to support compensation in this case. *Guy v. Burlington Industries*, 74 N.C. App. 685, 329 S.E.2d 685 (1985). In this case of first impression, we must have some scientific basis and specific evidence on which to conclude that plaintiff was at an increased risk of being stung at the construction site.

Plaintiff has the burden of proof to show that the sting was an injury that arose out of and in the course of his employment. *Roberts*, 321 N.C. at 354, 364 S.E.2d at 420. We hold that plaintiff failed to show that he was at an increased risk of being stung than a member of the general public. Since there is no evidence to support a finding that plaintiff was at an increased risk of insect stings, the conclusion that the sting was an accident or injury arising out of the employment is error and the award of benefits must be reversed.

Since we hold that in this case the employee has not shown the insect sting to be a compensable injury, we do not reach plaintiff's

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second assignment of error that the sting materially aggravated his pre-existing condition. We remand the cause to the Commission for entry of an opinion denying plaintiff's claim.

Reversed and remanded.

Judges MARTIN, John C., and MCGEE concurred in this opinion prior to 31 July 1997.

SOCKWELL & ASSOCIATES, INC., PLAINTIFF V. SYKES ENTERPRISES
INCORPORATED, DEFENDANT

COA96-1149

(Filed 5 August 1997)

1. Trial § 571 (NCI4th)— breach of contract—setting aside verdict—misapprehension of law—reversible error

In an action for breach of contract, the trial court committed reversible error by setting aside a jury verdict, on its own motion, in favor of plaintiff pursuant to Rule 59(a)(9) where the trial court based its decision on a misapprehension of law that, when a contract does not specifically set forth dates that payments are to be due, then it is impossible to determine when a breach, if any, has occurred. In this case ample evidence was presented from which the jury could have determined that a breach had occurred. N.C.G.S. § 1A-1, Rule 59(a)(9).

2. Judgments § 652 (NCI4th)— prejudgment interest—breach of contract—date of breach

The trial court erred in awarding prejudgment interest of ten days prior to the jury's verdict in a breach of contract case where there was no evidence in the record to support the court's award and there was evidence presented at trial from which the court could have selected a date of breach.

Appeal by plaintiff from order entered 20 May 1996 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 May 1997.

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Robinson, Bradshaw & Hinson, P.A., by John R. Wester; and The Bishop Law Firm, by J. Daniel Bishop, for plaintiff appellant.

Helms, Cannon, Hamel & Henderson, by Christian R. Troy, for defendant appellee.

COZORT, Judge.

Plaintiff Sockwell and Associates (Sockwell) won a jury verdict of \$23,342.15 on its breach of contract claim against defendant Sykes Enterprises Incorporated (SEI). After plaintiff requested prejudgment interest, the trial court set aside the jury's verdict and ordered a new trial. Plaintiff appeals. We reverse.

The facts underlying plaintiff's breach of contract action are as follows. Sockwell is a firm that identifies and recruits executives for businesses. SEI retained Sockwell to search for a new director of marketing for SEI. The parties executed a written contract on 14 January 1994. The contract provided

Our professional fee for conducting each search is 33-1/3% of the first year's total expected cash compensation for the position including cash incentives and signing bonuses. Based on the information you have shared with us, we believe the successful candidate's total cash compensation in year one will be at least \$100,000. Thus, our projected fee will be \$33,000, billed in three monthly installments of \$11,000 each. If the successful candidate's compensation package differs from this estimate, an adjustment will be made in the fee, either up or down, at the conclusion of the search.

* * * *

While we hope it will not be necessary, our clients have the right to cancel the search at any time. Cancellation is effective upon our receipt of your written notice.

If the engagement is canceled, your obligation for payment includes all expenses incurred and professional services rendered before notice is received. Regarding fees for professional services, if the engagement is canceled more than ninety (90) days after the contract approval date, your obligation is for the entire professional fee. Otherwise, your obligation is for a percentage of the professional fee determined by dividing active

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search days (contract approval date through cancellation date) by ninety (90) days.

After execution of the contract, Sockwell began working on finding candidates for SEI. The contract provided that the president of SEI would meet with the candidates at the end of March 1994. At some point, Sockwell learned that the president would be unavailable at the end of March so Sockwell made arrangements for the first candidate to meet earlier than that date with SEI's president. However, SEI was not interested in the candidate and decided not to meet with him. By this time, Sockwell had issued two invoices to SEI: the first at the end of January 1994, and the second at the end of February 1994. These bills were never paid. Ed Sockwell, president of Sockwell, testified that the total out of pocket expenses of Sockwell on the SEI matter was \$1,342.15. On 9 May 1994 based on lack of communication from SEI, Sockwell cancelled its search for SEI's marketing director.

On 25 August 1994, Sockwell initiated this action for breach of contract. Prior to trial, the parties stipulated that they had formed a "valid and binding contract" and that the "fee to be paid to Sockwell & Associates under the contract was not contingent upon the successful placement of a director of marketing." At trial, both parties offered evidence. During cross-examination, the president of SEI testified he knew when he signed the contract that SEI was to be billed in monthly installments.

At the charge conference the parties agreed that the issues to be submitted to the jury were

1. Did the Defendant, Sykes Enterprises Incorporated, breach the contract with Sockwell & Associates?
2. What amount of damages is the Plaintiff entitled to recover?

Defendant requested an instruction on justification to go along with the instruction on prevention. The court properly instructed on both doctrines. On 8 May 1996, the jury returned a verdict finding that defendants breached the contract and that plaintiff was entitled to damages of \$23,342.15. After the jury was excused, the only issue the parties raised was the timing of prejudgment interest. The trial court directed plaintiff to prepare the judgment and allowed plaintiff only ten days' prejudgment interest. At no time did defendant make a motion to set aside the verdict or for a new trial. Subsequently plaintiff wrote the trial court and requested reconsideration of the

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prejudgment interest. On 13 May 1996, pursuant to N.C. Gen. Stat. § 1A-1, Rule 59(d) (1990), the court on its own motion set aside the verdict and ordered a new trial. The court stated, "it's very suspect as to when payments were to be made, and consequently, some impossibility as to when the breach occurred, if that occurred. And, for that reason, and in the interest of justice, the Court . . . is setting aside the verdict. . . ." The court cited Rule 59(a)(9) as its basis for setting aside the verdict. Rule 59(a)(9) provides that a trial court may set aside a verdict for "[a]ny other reason heretofore recognized as grounds for new trial."

[1] Plaintiff appeals, contending the trial court erred by setting aside the verdict. We agree. Generally a trial court's decision to set aside a verdict and order a new trial will not be reversed by this Court unless we find an abuse of discretion. *Bryant v. Nationwide Insurance Co.*, 313 N.C. 362, 318, 329 S.E.2d 333, 344 (1985). However, when a verdict is set aside and a trial court grants a new trial because of a question of law or legal inference, then the court's decision is fully reviewable. *Chiltoski v. Drum*, 121 N.C. App. 161, 164, 464 S.E.2d 701, 703 (1995), *disc. review denied*, 343 N.C. 121, 468 S.E.2d 777 (1996); *Cummings v. Snyder*, 91 N.C. App. 565, 568, 372 S.E.2d 724, 725 (1988); *Britt v. Allen*, 291 N.C. 630, 636, 231 S.E.2d 607, 611 (1978). We hold the trial court below erred and that his decision to grant a new trial should be reversed.

The court granted a new trial based on the misapprehension of law that, when a contract does not specifically set forth the dates that payments are to be due, then it is impossible to determine when a breach, if any, occurred. The trial court's statement of the law is inaccurate, and the court's order constitutes reversible error. *Chiltoski*, 121 N.C. App. at 164, 464 S.E.2d at 703. Specificity of payment due dates is not required to show breach of contract for nonpayment. Our courts have held that where no date for payment is specified in the contract, the courts will presume a reasonable time. *International Minerals & Metals Corp. v. Weinstein*, 236 N.C. 558, 561, 73 S.E.2d 472, 474 (1952); *Helms v. Prikopa*, 51 N.C. App. 50, 275 S.E.2d 516 (1981). The contract provided for three monthly installments of Sockwell's fee. The contract provided that the fee was not contingent upon Sockwell locating a director of marketing for SEI. It is apparent that the parties' intention was for monthly payments. However, to the extent necessary to find a breach occurred, the jury could have presumed other reasonable due dates and still found that SEI let these dates pass without making a single payment as they had contracted to

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do. By no means did the absence of specific dates make it impossible for the jury to have determined that a breach occurred.

Moreover, the crux of plaintiff's case is predicated on the defendant's nonresponsiveness, preventing the plaintiff from performing its portion of the contract. Under the evidence and instructions to the jury, to which neither party objected, the due dates of the invoices were irrelevant to a finding of breach. Plaintiff submitted to the jury that SEI either wrongfully terminated the contract or prevented Sockwell from performing the contract, entitling Sockwell to partial payment of its fee. Defendant submitted Sockwell had abandoned the project after SEI's circumstances required it to put the project on hold. The court's concern over the lack of payment due dates was erroneous.

[2] Plaintiff also contends the trial court erred in its award of prejudgment interest. N.C. Gen. Stat. § 24-5(a) (1991) provides that "the amount awarded on the contract bears interest from the date of breach." The jury verdict in this case established that there was a breach of the contract and awarded plaintiff damages. Once these facts were established, plaintiff was entitled to interest from the date of the breach as a matter of law. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 431, 349 S.E.2d 552, 558 (1986). Since the parties did not submit this issue to the jury, it was up to the trial court to determine the date of breach for the prejudgment interest award. *Metromont Materials Corp. v. R.B.R. & S.T.*, 120 N.C. App. 616, 618, 463 S.E.2d 305, 307 (1995), *disc. review denied*, 342 N.C. 895, 467 S.E.2d 903 (1996). While the trial court may select the date which was "the latest one on which breach could have been found" in the present case, the court's selection of ten days prior to the jury's verdict is not supported by the record or the evidence presented at trial. *Taha v. Thompson*, 120 N.C. App. 697, 702-03, 463 S.E.2d 553, 557 (1995) (court approved use of latest breach date possible). Ed Sockwell testified that two monthly invoices for the first two installments of the \$33,000 fee had been sent to SEI, that SEI never paid, and that Sockwell terminated its search for SEI's marketing director on 9 May 1994. Sockwell testified that he never heard from SEI after 6 June 1994. Plaintiff submits that 6 June 1994 should be the latest date the court could have selected as the date of breach. We hold that it is within the province of the trial court to set the date of breach. We hold that the trial court must review the evidence presented and select a date of breach. The court is authorized to take additional evidence, if necessary.

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In sum, the order of the trial court granting a new trial is reversed, and the case remanded for reinstatement of the verdict, a determination of the date of breach for imposition of prejudgment interest, and entry of judgment for plaintiff.

Reversed and remanded.

Judges MARTIN, Mark D., and TIMMONS-GOODSON concurred in this opinion prior to 31 July 1997.



CHARLES PARHAM, INDIVIDUALLY AND WIFE, LOUISE PARHAM, INDIVIDUALLY AND AS GUARDIAN AD LITEM OF ROBIN PARHAM, PLAINTIFFS V. IREDELL COUNTY DEPARTMENT OF SOCIAL SERVICES AND FRANKIE R. MARTIN, SOCIAL WORK SUPERVISOR, IREDELL COUNTY DEPARTMENT OF SOCIAL SERVICES, INDIVIDUALLY, DEFENDANTS

No. COA96-1202

(Filed 5 August 1997)

1. State § 33 (NCI4th)— adoption—delayed treatment of child—incomplete history—negligence action—DSS an agent of State

The trial court correctly concluded that the Iredell DSS is an agency of the State where plaintiffs sought damages for delayed medical and psychiatric treatment of an adopted child resulting from defendants' failure to provide accurate and complete information about her and the trial court found that the case fell within the Tort Claims Act. The statutory scheme for adoption proceedings and filings in this state provides that county DSS directors act as agents of the Department of Human Resources, a state agency. Furthermore, Chapter 48 as it now exists provides DHR and its Division of Social Services with more rule making authority and also provides that "agency" means a county department of social services.

2. State § 39 (NCI4th)— adopted child—incomplete history—delayed treatment—Tort Claims action—jurisdiction—insurance policy limit

An action against defendant-Iredell Department of Social Services and one of its employees for damages arising from delayed treatment of an adopted child resulting from defendants'

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failure to disclose her history was remanded for findings of fact regarding the amount of Iredell DSS' insurance policy limit where there was an allegation that defendants waived governmental immunity by purchasing liability insurance but the record is silent as to the amount. Damages under N.C.G.S. § 143-291(a) are capped at \$150,000 for causes of action arising on or after 1 October 1994. If DSS's policy limit is less than \$150,000.00 then jurisdiction is with the Industrial Commission and if it is \$150,000 or more the superior court has jurisdiction over the matter.

3. State § 46 (NCI4th)— adopted child—failure to disclose record—allegations of fraudulent concealment and false representations—jurisdiction

The trial court rather than the Industrial Commission had jurisdiction over an action against the Iredell County Department of Social Services (Iredell DSS) and one of its employees for damages arising from delayed treatment of an adopted child resulting from defendants' failure to disclose her history where the court held that the evidence does not support that defendant acted maliciously or corruptly, as required to take the acts outside defendants' employment relationship, but the matter was before the trial court on a motion to dismiss for failure to state a claim upon which relief could be granted and no evidence appears in the record. However, plaintiffs alleged false representations and fraudulent concealment of material information with the intent to deceive plaintiffs, and it cannot be said that these allegations fall short of "malicious and corrupt."

Appeal by plaintiffs from order entered 18 April 1996 by Judge Henry V. Barnette, Jr., in Vance County Superior Court. Heard in the Court of Appeals 20 May 1997.

Broughton, Wilkins, Webb & Sugg, P.A., by William Woodward Webb and R. Palmer Sugg, for plaintiff appellants.

Tate, Young, Morphis, Bach & Taylor, L.L.P., by T. Dean Amos, for defendant appellees.

COZORT, Judge.

Plaintiffs filed suit in superior court against the Iredell County Department of Social Services (Iredell DSS) and one of its employees, alleging defendants failed to provide accurate and complete information about a child being considered for adoption. The trial court dis-

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missed, holding the court lacked jurisdiction because the case was subject to the Tort Claims Act, and further holding there was no evidence the defendant-employee acted maliciously. We find the trial court failed to make findings of fact as to whether the county purchased insurance in an amount divesting the Industrial Commission of jurisdiction, and we find the complaint sufficiently alleged malicious and corrupt action by the defendant-employee to survive a motion to dismiss. We reverse and remand.

Plaintiffs filed a complaint in superior court alleging they are the adoptive parents and the guardian ad litem for Robin Parham. Plaintiffs adopted Robin with the assistance of Iredell DSS. Robin was placed with the Parhams in December 1987, and they adopted her on or about 24 October 1988. Iredell DSS represented to plaintiff parents that Robin was "healthy" and doing "reasonably well in school." In fact, plaintiffs allege, Robin had been abused, neglected and sexually abused while she lived with her natural mother. In addition, Robin was doing poorly in school. The plaintiffs contend they did not learn of Robin's true history until May 1991. Plaintiffs contend that their failure to know Robin's true background kept them from providing the appropriate treatment for Robin's needs and has caused Robin to suffer mental anguish and emotional distress.

On 5 August 1992, plaintiffs filed this action seeking damages for the emotional distress, medical and psychiatric expenditures and the lost opportunities for proper medical and psychiatric treatment for Robin. Plaintiffs alleged that defendants breached their duty to the parents by negligently failing to provide them with accurate and complete information about Robin and her needs and acted in willful and wanton disregard of others. Against the individual defendant, plaintiffs alleged that she fraudulently concealed material information and misrepresented information regarding Robin's condition causing the parents to rely on it to their and Robin's detriment.

Defendants answered that Frankie Martin was at all times engaged in her duties as an employee of Iredell DSS and that Iredell DSS and its employee have governmental immunity. Defendants contended that such immunity was not waived by their purchase of insurance. Further defendants contended plaintiffs' claims were barred by the statute of limitations and that the complaint failed to state a claim pursuant to Rule 12(b)(6).

On 3 January 1996, defendants moved to dismiss plaintiffs' complaint for lack of subject matter jurisdiction. In its Memorandum of

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Decision of 8 February 1996 the trial court found that the case fell within the North Carolina Tort Claims Act, divesting the court of subject matter jurisdiction. The court entered an order to this effect on 18 April 1996. In its Memorandum, the court found that Iredell DSS was a "State agency in the administration of adoptions." The court also found that Frankie Martin was acting in her official capacity and had the same governmental immunity as her employer. Additionally, the court stated that the evidence did not support that "she [Martin] acted maliciously." Plaintiffs appeal.

[1] On appeal, plaintiffs argue the court erred in concluding that Iredell DSS is an agent of the state in the performance of their adoption duties. We disagree.

The Tort Claims Act includes within its scope tort claims against agencies of the state. N.C. Gen. Stat. § 143-291(a) (1996). While the Supreme Court and this Court have not specifically addressed whether a county DSS agency is a state agent when it performs adoption services, we have addressed similar situations.

In *Vaughn v. Dept. of Human Resources*, 296 N.C. 683, 252 S.E.2d 792 (1979), our Supreme Court held that a county DSS was an agent of the state Social Services Commission (a division of the Department of Human Resources) with respect to delivery of foster care services. Therefore, in that case the North Carolina Department of Human Resources (DHR) was liable under a doctrine of respondeat superior for negligent acts of the county's social services director with respect to placement of children in foster care, and the appropriate forum for the action was the Industrial Commission. *Id.* at 690-91, 252 S.E.2d at 797. In arriving at this conclusion the Court reviewed the statutory scheme governing placement of children in foster care. *Id.* at 688, 252 S.E.2d at 796. The *Vaughn* Court found the scheme indicated the county DSS director acts on behalf of DHR, and his actions were subject to its control. DHR, through the Social Services Commission, had the right to control the manner in which the county DSS placed a child in foster care. *Id.* at 690, 252 S.E.2d at 797.

This Court held that the county was acting as an agent of the Social Services Commission and DHR in its delivery of child protective services. *Coleman v. Cooper*, 102 N.C. App. 650, 403 S.E.2d 577, *disc. review denied*, 329 N.C. 786, 408 S.E.2d 517 (1991). We examined the relevant statutes and concluded that the county DSS director was required to submit reports of abuse to the central registry under policies adopted by the Social Services Commission. *Id.* at 658, 403

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S.E.2d at 581. The central registry of abuse and neglect cases was maintained by DHR. *Id.* Accordingly since the county was acting as agent of the state, we held that the cause of action originating under the Tort Claims Act against the county must be brought before the Industrial Commission. *Id.* at 658, 403 S.E.2d at 581-82.

In *Gammons v. N.C. Dept. of Human Resources*, 344 N.C. 51, 472 S.E.2d 722 (1996), our Supreme Court analyzed the relevant statutory scheme along with the mandatory administrative regulations. The Court found that those statutes and rules demonstrated the degree of control retained by DHR over the provision of child protective services on the county level. *Id.* at 63, 472 S.E.2d at 729. The *Gammons* Court held, "regarding the provision of child protective services, there exists a sufficient agency relationship between the Department of Human Resources and the . . . County Director of Social Services and his staff such that the doctrine of *respondeat superior* is implicated." The Court held that the Industrial Commission had jurisdiction over the case. *Id.* at 64, 472 S.E.2d at 729.

These cases suggest that the determining factor is the degree of control and supervision exercised by DHR or the Social Services Commission. The higher the level of involvement of the state, the more likely it is that the county DSS is operating as an agent of the state, requiring tort claims against the county DSS to be brought in the Industrial Commission. From our review of former Chapter 48, the adoption statute applicable to the present case, it is apparent that DHR is the overseer of the adoption process in North Carolina. When a petition for adoption is filed it may be on a form provided by DHR, and a copy must be sent to DHR and the director of the county DSS. N.C. Gen. Stat. § 48-15 (1991). A review of the prior statute indicates that DHR provides all of the forms on which the adoption procedures are recorded. N.C. Gen. Stat. § 48 (1991). The county DSS director and Human Resources must be notified when an adoption petition is dismissed. N.C. Gen. Stat. § 48-20(b) (1991). The entire record of the adoption proceedings must be sent to DHR within ten days of its filing. N.C. Gen. Stat. § 48-24 (1991). DHR maintains the permanent index of the adoption proceedings and filings in North Carolina. N.C. Gen. Stat. § 48-24(c). We find the statutory scheme providing for adoption proceedings in this state provides that county DSS directors are acting as agents for Human Resources. Thus, we hold that the Iredell DSS is an agency of the state during its involvement in adoption proceedings. Our holding is reinforced by our legislature's complete revamping of North Carolina adoption law in 1995. Chapter 48,

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as it now exists, provides DHR and its Division of Social Services (formerly Social Services Commission) with more rule-making authority. We also note that N.C. Gen. Stat. § 48-1-101(4) (1995) (effective date 1 July 1996) provides that “[a]gency’ also means a county department of social services” We thus affirm the trial court’s finding that Iredell DSS is a state agency.

[2] This finding, however, is not dispositive of this appeal. We must remand this case to the trial court pursuant to this Court’s opinion in *Meyer v. Walls*, 122 N.C. App. 507, 471 S.E.2d 422, *disc. review allowed*, 344 N.C. 438, 476 S.E.2d 119 (1996). In *Meyer*, the administratrix of a mentally ill man’s estate filed a wrongful death action against a number of defendants, including the Buncombe County DSS and its director in his individual and official capacity. There was an allegation that the county had purchased insurance; however, the record was silent as to the amount. We held that where governmental immunity was waived by the purchase of liability insurance, jurisdiction for tort actions is statutorily vested in the superior court. *Id.* at 512, 471 S.E.2d at 426. We remanded the matter to the superior court to make findings of fact as to whether the insurance policy or policies in question have liability limits equal to or greater than \$100,000. If the limits were less than \$100,000, jurisdiction was in the Industrial Commission; if equal or greater than \$100,000 then jurisdiction was with the superior court. *Id.* at 514, 471 S.E.2d at 427-28.

In the present case, we remand for the trial court to make findings consistent with *Meyer*. We note here that the General Assembly amended N.C. Gen. Stat. § 143-291(a) so that damages are capped at \$150,000 for causes of action arising on or after 1 October 1994. If the insurance policies have limits equal to or greater than \$150,000, jurisdiction is with the superior court and the matter shall proceed on its merits. *See* N.C. Gen. Stat. § 143-291(a); N.C. Gen. Stat. § 153A-435 (1991). In its answer, defendants alleged that their insurer “advised” that the policy did not cover allegations such as plaintiffs’. This statement is not binding on the trial court.

[3] The trial court also found that it lacked jurisdiction under the rule of law which confers jurisdiction in the superior court, rather than the Industrial Commission, for civil actions involving malicious and corrupt acts, more than mere negligence, taking the acts outside the scope of the defendant-employee’s employment. *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985), *appeal after remand*, 85 N.C. App. 237, 354 S.E.2d 365, *cert. denied*, 320 N.C. 178,

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358 S.E.2d 72 (1987). To reach this conclusion, the trial court held that “[t]he evidence does not support that she acted maliciously or corruptly.” This conclusion is in error. The matter was before the trial court on an N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (1990) motion to dismiss. In the record filed in this Court, no evidence appears. The only pleading considered by the trial court was the plaintiffs’ complaint. In that complaint, plaintiffs alleged false misrepresentations and fraudulent concealment of material information with the intent to deceive plaintiffs. We cannot say that these allegations fall short of being malicious and corrupt. These allegations properly survive a Rule 12(b)(1) motion to dismiss.

In summary, we hold that the Iredell DSS is acting as an agent of DHR in its delivery of adoption services to plaintiffs. However, whether jurisdiction is with the superior court or the Industrial Commission is a question of fact to be determined by the trial court on remand. The court shall look only to whether Iredell County and/or Iredell DSS has purchased insurance and, if so, the limits of the policy. If coverage is less than \$150,000, then jurisdiction is with the Industrial Commission and the court shall dismiss the first two counts of plaintiffs’ complaint. The superior court has jurisdiction over plaintiffs’ counts three, four, and five as these allegations are of malicious, corrupt, and willful and wanton actions.

Reversed and remanded.

Judges MARTIN, Mark D., and TIMMONS-GOODSON concurred in this opinion prior to 31 July 1997.

EDMOND T. LEWIS, PLAINTIFF v. CITY OF KINSTON, DEFENDANT

No. COA96-1517

(Filed 5 August 1997)

**1. Municipal Corporations § 363 (NCI4th)— city employees—
residency in county—ordinance unconstitutional**

A city ordinance requiring city employees to reside in the county was invalid under the equal protection clause because the residency requirement did not bear a rational relationship to legitimate government purposes given for enacting the ordinance

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of ensuring that city employees contribute to the city's tax base, vote in city elections, participate in the city's community, and have quick access to their jobs in the event of civil unrest, catastrophe or natural disaster.

2. Municipal Corporations § 363 (NCI4th)— ordinance—residency requirement—exemptions—discretion in city manager—unconstitutionality

An ordinance which required city employees to reside within the county but allowed the city manager to have unlimited discretion in approving or disapproving exemptions from the residency requirement for "extreme hardship" was unconstitutional on its face.

Appeal by defendant from order entered 4 October 1996 by Judge James D. Llewellyn in Lenoir County Superior Court. Heard in the Court of Appeals 5 June 1997.

Dal F. Wooten, III, for plaintiff-appellee.

Wallace, Morris, Barwick & Rochelle, P.A., by Edwin M. Braswell, Jr., and Vernon H. Rochelle, for defendant-appellant.

MARTIN, John C., Judge.

Plaintiff, a City of Kinston police officer, filed this declaratory judgment action seeking to test the validity and enforceability of an ordinance adopted by defendant City of Kinston (City) requiring city employees to live within Lenoir County. The ordinance, enacted 21 May 1984, states, in pertinent part:

(b) Although it is highly desirable that all employees of the city reside within the city, employees may reside outside the city limits, but all employees shall be required to live within the boundaries of the county.

...

(d) The provisions of this section shall apply to employees employed or reemployed on or after May 21, 1984.

Kinston City Code 1961, Sec. 2-137. On 29 November 1988, an administrative personnel policy was promulgated requiring that all city employees maintain their residence in Lenoir County. The administrative policy, however, gave the city manager authority to grant

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“extensions” or waivers of the residency requirement in cases of “extreme hardship,” and contractual, seasonal and temporary employees were exempted. In 1994, Sec. 2-137 was amended by the City Council to permit building inspectors to reside within a 50 mile radius of the city.

Plaintiff, who then maintained his residence in Lenoir County, became employed by defendant City as a police officer. Plaintiff subsequently moved his residence to Duplin County. On 8 May 1995, plaintiff was advised by defendant City’s chief of police that his employment would be terminated if he did not move to Lenoir County in compliance with the residency ordinance.

Plaintiff filed this action, seeking a judgment declaring defendant City’s ordinance and personnel policy unconstitutional and to enjoin defendant City from enforcing the residency requirement. Both plaintiff and defendant City moved for summary judgment. The trial court granted plaintiff’s motion for summary judgment, denied defendant’s motion for summary judgment, declared the residency requirements set out in City Code Section 2-137(b) unconstitutional, and permanently enjoined defendant City from enforcing the residency ordinance. Defendant appeals.

[1] The Declaratory Judgment Act permits any person affected by a statute or municipal ordinance to obtain a declaration of his rights thereunder. N.C. Gen. Stat. § 1-254 (1996). Summary judgment may be entered upon the motion of either the plaintiff or the defendant under N.C.R Civ. P. 56, and the rule applies in an action for declaratory judgment. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972). In addressing a motion for summary judgment, the trial court is required to view the pleadings, affidavits and discovery materials available in the light most favorable to the non-moving party to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). Summary judgment is proper where the moving party can establish that an essential element of the opposing party’s claim does not exist, or that the opposing party cannot produce evidence to support an essential element. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992). “If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper.” *Franklin Road Properties v. City of Raleigh*, 94 N.C. App. 731, 737, 381 S.E.2d 487, 491 (1989).

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Here, there is no controversy with respect to the facts in evidence; the controversy exists with respect to the legal significance of those facts. The present case is, therefore, a proper case for summary judgment determining the validity and enforceability of City Code Section 2-137(b) of the City of Kinston. We hold that the ordinance is invalid for the reasons hereinafter set forth and affirm the trial court's entry of summary judgment in favor of plaintiff.

Where a municipal employee residence requirement bears a rational relationship to one or more legitimate state purposes, it is constitutional under the traditional equal protection test. *See Ector v. City of Torrance*, 514 P.2d 433 (Cal. 1973), *cert. denied*, 415 U.S. 935, 39 L.Ed.2d 493 (1974) (used the rational basis test to uphold the validity of a charter city provision requiring city employees to be city residents); *Hattiesburg Firefighters Local 184 v. City of Hattiesburg*, 263 So.2d 767 (Miss. 1972) (held that city ordinance requiring civil service employees to reside within corporate limits of city and to move within city within 60 days was not unconstitutional as violating equal protection, due process, or prohibitions against ex post facto laws and laws impairing the obligation of contracts); *Salt Lake City Firefighters Local 1645 v. Salt Lake City*, 449 P.2d 239 (Utah 1969), *cert. denied*, 395 U.S. 906, 23 L.Ed.2d 220 (1969) (held that city had power to require that appointed officers and employees of city be residents of city). The Equal Protection Clause requires that, in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made." *Hattiesburg Firefighters Local 184*, 263 So.2d at 771. In applying the rational basis test, the *Ector* Court noted a number of rational purposes in municipal public policy to justify residency requirements, such as enhancement of the quality of employee performance by greater personal knowledge of the city's conditions; diminution of absenteeism and tardiness among municipal personnel; ready availability of trained manpower in emergency situations; and the general economic benefits flowing from local expenditure of employees' salaries. *Ector*, 514 P.2d at 436.

In the present case, defendant City's manager testified that the purposes for enacting the residency ordinance were to ensure that city employees contribute to the city's tax base, vote in city elections, and participate in the city's community. In addition, defendant City asserted in its answer that its emergency personnel should "live where it is possible for them to have quick access to their jobs in the event of civil unrest, catastrophe or natural disaster."

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While these purposes are undeniably legitimate governmental purposes, application of the rational basis test to the ordinance in this case leads us to the conclusion that defendant City's residency requirement does not bear a rational relationship to those purposes. Unlike *Ector*, *Hattiesburg*, and *Salt Lake City*, *supra*, Kinston's ordinance and the administrative policy promulgated pursuant thereto require city employees to reside, not within the City of Kinston, but rather within Lenoir County, eliminating three of the four purposes for which defendant City ostensibly enacted the residency ordinance. If an employee resides in Lenoir County, but not in the City of Kinston, he can neither vote in municipal elections, nor contribute to the city's tax base. Also, an employee who lives in a neighboring county, nearby the City of Kinston, may be just as apt to participate in the community life of Kinston as an employee who lives outside the city but still within Lenoir County.

Moreover, the residency ordinance does not bear a rational relationship to the legitimate governmental purpose of ensuring rapid emergency assistance. The city manager testified that emergency personnel should have a one-hour response time. Plaintiff states in his affidavit that his present address in Duplin County, is approximately fourteen miles and twenty-five minutes from the Kinston city limits. He also stated that his Duplin County residence is nearer to Kinston, and accessible by better highways, than some locations within Lenoir County, such as the town of Pink Hill, which is approximately eighteen miles from the City of Kinston. This Court takes judicial notice of the non-concentric configuration of Lenoir County areas and that many locations in the counties of Craven, Jones, and Duplin are closer to the City of Kinston than parts of Lenoir County. Because of the non-concentric configuration of Lenoir County, defendant City's use of the county's political boundaries as its "residency area" is not rationally related to any recognized reason for upholding residency requirements.

[2] Plaintiff also challenged the residency ordinance as unconstitutional on its face in that it vests unlimited discretion in the city manager.

"[A]n ordinance which vests unlimited or unregulated discretion in a municipal officer is void." *Maines v. City of Greensboro*, 300 N.C. 126, 131, 265 S.E.2d 155, 158 (1980). In *Maines*, a Greensboro firefighter was terminated from employment because he moved outside the city in violation of a city ordinance requiring city employees to

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live within the city limits of Greensboro. He challenged the ordinance as unconstitutional. The North Carolina Supreme Court upheld the residency requirement, concluding that the ordinance did not vest "unfettered discretion" in the city manager to enforce the ordinance, *Maines*, 300 N.C. at 131, 265 S.E.2d at 159, and that there was no showing that the ordinance had been applied unequally to persons similarly situated, and therefore, no violation of the Equal Protection Clause had occurred. *Id.* at 133, 265 S.E.2d at 160. Our Supreme Court reasoned that because the ordinance directed the city manager to implement the residency rules and prescribe other reasonable standards which were "consistent with the standards and criteria" specifically set out in the ordinance, the ordinance did not vest unlimited discretion in the city manager to enforce the ordinance.

In the present case, the policy permitting defendant's city manager to grant "extensions" from the residency requirement contains no objective standards or criteria by which "cases of extreme hardship" may be defined, requiring only a showing that adhering to the requirement may be "impractical or other good and sufficient reasons considered to be controlling or in the best interest of the City . . .," which affords the city manager practically unlimited discretion in approving or disapproving requests for exemption from the residency requirement.

For the foregoing reasons, we conclude the residency requirement imposed by Section 2-137(b) of the Kinston City Code and the administrative policy promulgated pursuant thereto are violative of plaintiff's right to equal protection of laws guaranteed by the Fourteenth Amendment to the United States Constitution and by Article I, Section 19 of the North Carolina Constitution. Accordingly, the trial court properly entered summary judgment in favor of plaintiff.

Affirmed.

Judges LEWIS and WYNN concur.

WALKER v. BD. OF TRUSTEES OF THE N.C. LOCAL GOV'T. EMP. RET. SYS.

[127 N.C. App. 156 (1997)]

JAMES E. WALKER, INDIVIDUALLY AND AS ADMINISTRATOR FOR THE ESTATE OF SARAH S. WALKER, PETITIONER V. THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, RESPONDENT

No. COA96-713

(Filed 5 August 1997)

1. Retirement § 10 (NCI4th)— local government employee— death benefit—death “in service”

In the statute providing for payment of a death benefit to the beneficiary of a member of the Local Governmental Employees' Retirement System who dies “in service,” an employee's time “in service” is the time for which salary is earned; therefore, a death benefit is available only if the employee dies within 180 days after he or she last earned a salary, whether it be earned from time spent actually working or from time credited for sick and annual leave.

2. Retirement § 10 (NCI4th)— local government employee— last day of actual service

If an employee of the Local Governmental Employees' Retirement System is separated for reasons other than retirement, the last day of actual service is the date of separation, with no time credited for accumulated vacation or sick leave; if the employee takes medical leave without pay or retires, the last day of actual service is dependent upon the time credited for accumulated vacation and sick leave.

3. Retirement § 10 (NCI4th)— local government employee— retirement on disability—last day of service

When a county employee retired on disability, she was not “terminated” within the meaning of the death benefit statute for members of the Local Governmental Employees' Retirement System; rather, under the formula set forth in the statute, the last day of the employee's actual service was the date on which her sick and annual leave expired.

Appeal by respondent from order and judgment entered 25 March 1996 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 February 1997.

In December 1977 petitioner's wife became employed by Mecklenburg County as a social worker. In May 1990 she was diag-

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nosed with cancer, and her last day of actual work was 1 June 1990, when she was placed on medical leave with pay. On 12 March 1991 she was placed on medical leave without pay, after having exhausted her sick and annual leave. On 17 June 1991 she applied for disability retirement, which was approved effective 1 August 1991. She died on 18 October 1991.

After being denied his wife's death benefit under the North Carolina Local Governmental Employees' Retirement System, petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings on 5 October 1993. After a hearing on 2 February 1994, Administrative Law Judge (ALJ) Brenda B. Becton filed a decision recommending that the Board of Trustees of the North Carolina Local Governmental Employees' Retirement System (the Board) issue a final agency decision in favor of petitioner. On 31 January 1995, the Board rejected Judge Becton's recommendations and entered a Final Agency Decision in favor of respondent.

Petitioner filed a petition to the Mecklenburg County Superior Court for judicial review. On 25 March 1996 Judge Marvin K. Gray entered an order reversing the Final Agency Decision and remanding the matter for reinstatement of the ALJ's Recommended Decision. Respondent appeals.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by John W. Gresham, for petitioner appellee.

Attorney General Michael F. Easley, by Special Deputy Attorney General Alexander McC. Peters, for respondent appellant.

ARNOLD, Chief Judge.

Our standard of review on appeal from a superior court order affirming or reversing an agency decision is the same as that employed by the superior court. *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62-63, 468 S.E.2d 557, 560, *cert. denied*, 344 N.C. 629, 477 S.E.2d 37 (1996); *Dockery v. N.C. Dept. of Human Resources*, 120 N.C. App. 827, 463 S.E.2d 580 (1995). When the issue on appeal is whether the agency decision is supported by the evidence, the "whole record" test is appropriate. *Dorsey*, 122 N.C. App. at 62, 468 S.E.2d at 559-60. When the issue is whether the agency erred in interpreting a statutory term, an error of law is asserted, and this Court may substitute its own judgment for that of the agency and exercise *de novo* review. *Id.*, 468 S.E.2d at 559; *Friends of Hatteras Island v. Coastal*

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Resources Comm., 117 N.C. App. 556, 567, 452 S.E.2d 337, 344 (1995).
See N.C. Gen. Stat. § 150B-51 (1995).

We therefore exercise *de novo* review to interpret the statutory provision of the Local Governmental Employees' Retirement System that allows for payment of a death benefit to the beneficiary of a member who dies while "in service." N.C. Gen. Stat. § 128-27(1) (1995 & Supp. 1996).

For the purpose of the [Death Benefit] Plan, a member shall be deemed to be in service at the date of his death if his death occurs within 180 days from the last day of his actual service.

....

In administration of the death benefit the following shall apply:

....

(2) Last day of actual service shall be:

a. When employment has been terminated, the last day the member actually worked.

b. When employment has not been terminated, the date on which an absent member's sick and annual leave expire.

Id.

Respondent's position is that when petitioner's decedent retired on disability, her employment was effectively "terminated" within the plain meaning of this provision. Her "last day of actual service" was therefore 1 June 1990, the last day she actually worked. Under this reading of the statute, adopted by the Board in its Final Agency Decision, her death on 18 October 1991 was more than 180 days after her "last day of actual service," and the death benefit is not payable to petitioner.

Petitioner contends, on the other hand, that the decedent's retirement did not "terminate" her employment within the context and purpose of this statute. Her "last day of actual service," therefore, was on 31 July 1991, the date petitioner argues his wife's sick and annual leave expired. Under this reading of the statute, adopted by both the ALJ and superior court, the decedent's death falls within 180 days of her "last day of actual service," and the death benefit is payable to petitioner.

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Upon a thorough examination of the statute and the facts of the case, we find neither party entirely correct. While we agree with petitioner that "termination" in the context of the death benefit statute does not encompass "retirement," we disagree about the date upon which the decedent's sick leave expired. As a result, we ultimately conclude that petitioner is precluded from recovering the death benefit.

We arrive at this conclusion by first carefully examining the death benefit statute itself. To interpret specific terms in the statute we begin by referring to the definitions explicitly set forth, "unless a different meaning is plainly required by the context." G.S. § 128-21. The statute explicitly defines "retirement" as "withdrawal from active service with a retirement allowance granted under the provisions of this Article." G.S. § 128-21(19). It is notable that "retirement" is not described as termination of employment.

The word "termination" is not defined in the statute. Therefore, to determine whether "termination" is intended to include retirement here, we look to the plain meaning required by the context. Because legislative intent "controls the interpretation of a statute, . . . the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute." *Burgess v. Brewing Co.*, 298 N.C. 520, 523-24, 259 S.E.2d 248, 251 (1979) (citations omitted).

The death benefit statute at issue does not include an explicit statement of reason and purpose. However, in interpreting the analogous provisions of the North Carolina Teachers' and State Employees' Retirement System, N.C. Gen. Stat. § 135-5 (1995), this Court has held that the overall policy and intent of the retirement, disability, and death benefit scheme "is not to exclude, but to include state employees under an umbrella of protections designed to provide maximum security in their work environment and to afford 'a measure of freedom from apprehension of old age and disability.'" *Stanley v. Retirement and Health Benefits Division*, 55 N.C. App. 588, 591, 286 S.E.2d 643, 645, *disc. review denied*, 305 N.C. 587, 292 S.E.2d 571 (1982) (quoting *Bridges v. Charlotte*, 221 N.C. 472, 477, 20 S.E.2d 825, 829 (1942)); *see also* *Garrett v. Teachers' & State Employees' Retirement System*, 91 N.C. App. 409, 371 S.E.2d 776, *disc. review denied*, 323 N.C. 624, 374 S.E.2d 585 (1988).

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[1] Considering this policy, along with the statutory formula to determine the “last day of actual service,” we find that an employee’s time “in service” is the time for which salary is *earned*. The protective umbrella, then, is inclusive only to the extent that a death benefit is available if the member dies within 180 days after she last *earned* a salary, whether it be earned from time spent actually working or from time credited for sick and annual leave.

In the context of the death benefit statute, it would be unjust to conclude that a member has “terminated” employment by retiring on disability after she exhausts sick and annual leave. The result would be that in calculating the 180-day extension period from the “last day of actual service,” a member who retires after exhausting sick and annual leave, and then dies soon afterwards, having only reaped minimal benefits from the retirement plan, would effectively forfeit credit for the time spent exhausting sick and annual leave, while a member who dies while delaying retirement would be credited with the time spent exhausting sick and annual leave. The effect of this arbitrary distinction would be to discourage retirement, undoubtedly in derogation of the protective purpose of the retirement, disability, and death benefits scheme.

We find support for this position in the North Carolina Administrative Code’s rules for state and eligible local personnel. The Code provides that upon “separation from service” due to resignation, dismissal, reduction in force, or death, accrued vacation leave is paid in a lump sum, and *the last day of work is the date of separation*. N.C. Admin. Code tit. 25, r. 1E.0210(a) (1995). Upon separation from service due to retirement, however, an employee “may elect to exhaust vacation leave after the last day of work but prior to the effective date of retirement. . . . If leave is exhausted, the *last day of leave is the date of separation*.” *Id.* (emphasis added). Moreover, when an employee is granted medical leave without pay, but has not yet retired, “[t]he date separated shall be *the last day of work or the last day leave is exhausted, whichever is later*. *Id.* r. 1E.0314 (emphasis added). “An employee shall exhaust accumulated sick leave before going on leave without pay.” *Id.* r. 1E.0314(1).

[2] These rules clearly indicate that if an employee is separated for reasons other than retirement, the last day of work is the date of separation, with no time credited for accumulated vacation or sick leave. If an employee takes medical leave without pay or retires, the last day of work is dependent upon the time credited for accumulated vaca-

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tion and sick leave. The death benefit statute can account for this distinction in credit allowances for accumulated vacation and sick leave only if it is read to distinguish retirement from termination of employment.

[3] Accordingly, we find that when the decedent retired on disability, she was not “terminated” within the meaning and context of the death benefit statute. Therefore, under the formula set forth in G.S. § 128-27(1), the last day of the decedent’s actual service was the date on which her sick and annual leave expired.

Petitioner argues that 31 July 1991 was the date his wife’s sick and annual leave expired, but upon review of the whole record, we find that although the decedent had .23 of a day of sick leave remaining when she took medical leave without pay, which she retained until her retirement, her sick and annual leave was in fact exhausted on 12 March 1991, the date on which she was granted medical leave without pay.

If the remaining .23 of a sick day were accounted for, it would at most shift the exhaustion date to 13 March 1991. The fact that the decedent did not actually receive payment for the .23 of a sick day until after her retirement does not have the effect of extending her sick leave beyond the date upon which it truly expired. Because the decedent died on 18 October 1991, more than 180 days after either 12 or 13 March 1991, the death benefit is not available to petitioner.

In sum, while we agree with the Final Agency Decision, we arrive at the result by a very different reading of G.S. § 128-27(1). The order of the superior court is reversed.

Reversed.

Judges MARTIN, John C., and TIMMONS-GOODSON concur.

ROBBINS v. FREEMAN

[127 N.C. App. 162 (1997)]

DONNIE EARL ROBBINS, PLAINTIFF-APPELLANT v. FRANKLIN FREEMAN, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION, IN HIS OFFICIAL CAPACITY; JUANITA BAKER, CHAIRMAN OF THE NORTH CAROLINA PAROLE COMMISSION, IN HER OFFICIAL CAPACITY; ELBERT BUCK, WILLIAM A. LOWRY, CHARLES L. MANN, SR., AND PEGGY STAMEY, MEMBERS OF THE NORTH CAROLINA PAROLE COMMISSION, IN THEIR OFFICIAL CAPACITIES, DEFENDANT-APPELLEES

No. COA96-223

(Filed 5 August 1997)

1. Criminal Law § 1608 (NCI4th Rev.)— consecutive armed robbery sentences—parole eligibility

The trial court erred in a declaratory judgment action to determine plaintiff's parole eligibility from consecutive armed robbery sentences by not finding that defendants were required by N.C.G.S. § 15A-1354(b) to aggregate consecutive sentences for armed robberies committed prior to 1 October 1994 for purposes of determining parole eligibility. Other than prescribing that a defendant must serve at least seven years of any sentence for armed robbery, N.C.G.S. § 14-87(c) did not affect how consecutive sentences were to be treated for parole eligibility purposes once the consecutive sentences had been imposed. Furthermore, no statutory authority could be found for the practice of issuing "paper paroles" for the first of consecutive sentences for armed robbery before the inmates are treated as having begun service of the second.

2. Robbery § 162 (NCI4th)— 1980 robberies—mandated minimum sentence—no gain time reduction

A defendant who was convicted of robbery charges which arose in 1980 was not entitled to a gain-time reduction of his sentence below the statutorily mandated seven-year minimum where the statute in effect at the time of defendant's convictions allowed a sentence reduction for good behavior, but made no provision for a reduction for gain time. N.C.G.S. § 14-87(c).

Judge WYNN concurring in the result only.

Judge JOHN concurs in the result and joins in Judge WYNN's opinion.

Appeal by plaintiff from order entered 9 January 1996 by Judge Knox V. Jenkins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 24 October 1996.

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Plaintiff Donnie Earl Robbins is an inmate in the custody of the North Carolina Department of Correction. On 1 April 1982, plaintiff pled guilty to, among other charges, three counts of robbery with a deadly weapon (case numbers 80-CRS-23443, 80-CRS-23442, and 80-CRS-28885). In case number 80-CRS-23443, plaintiff received a sentence of a maximum term of thirty years and a minimum term of fifteen years. In case number 80-CRS-23442, plaintiff received a maximum term of fifteen years and a minimum term of ten years. The sentence imposed in 80-CRS-23442 was to begin at the expiration of the sentence imposed in 80-CRS-23443. The sentence imposed in case number 80-CRS-28885, a maximum term of fifteen years and a minimum term of ten years, was to run concurrently with the sentence imposed in 80-CRS-23442.

Plaintiff filed this action 24 March 1995 for a declaratory judgment determining his parole eligibility. Plaintiff alleged that N.C. Gen. Stat. § 15A-1354(b) requires defendants to aggregate and treat, for parole eligibility purposes, consecutive sentences as a single offense, with the maximum sentence being the total of the maximum terms of the consecutive sentences and the minimum term being the total of the minimum terms of the consecutive sentences. Defendants engage in a process known as "paper parole," whereby an inmate serving consecutive sentences for armed robbery is required to be paroled from the first sentence to a second consecutive sentence before being treated as having begun service of the second sentence for purposes of determining parole eligibility. Plaintiff was "paper paroled" effective 8 March 1993 from the sentence in 80-CRS-23443 and is currently completing service of the sentence imposed in 80-CRS-23442. Plaintiff also alleged he was entitled to a reduction of the 7-year minimum mandatory sentences required by the applicable armed robbery statute to the extent of any gain time earned under N.C. Gen. Stat. § 148-13.

In an order filed 9 January 1996, the trial court held that sentences imposed for armed robberies committed prior to 1 October 1994 may not be aggregated pursuant to G.S. 15A-1354(b), and that inmates sentenced for armed robbery only begin serving the sentence at the completion of a prior sentence or upon having been "paper paroled" from a prior sentence to the armed robbery sentence. The trial court did not address the issue of reduction of the mandatory minimum to the extent of gain time earned. From this order, plaintiff appeals.

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George B. Currin, for plaintiff-appellant.

Attorney General Michael F. Easley, by Special Deputy Attorney General Jacob L. Safron and Assistant Attorney General David F. Hoke, for defendant-appellees.

McGEE, Judge.

[1] Plaintiff contends the trial court erred by failing to find that defendants are required, pursuant to G.S. 15A-1354(b), to aggregate consecutive sentences for armed robbery committed prior to 1 October 1994 for purposes of determining parole eligibility. We agree.

In determining the effect of consecutive sentences, the Department of Correction must treat a defendant as if he had been committed for a single term. N.C. Gen. Stat. § 15A-1354(b) (1985). In such a case, the minimum term of imprisonment consists of the total of the minimum terms of the consecutive sentences. G.S. 15A-1354(b)(2). We disagree with defendants' contention that the specific language of the armed robbery statute in effect at the time defendant committed his crimes controls over the provisions of G.S. 15A-1354.

The armed robbery statute applicable to plaintiff's crime, N.C. Gen. Stat. § 14-87(c) (repealed effective 1 July 1981), and its successor, N.C. Gen. Stat. § 14-87(d) (repealed effective 1 January 1995) both state that "[s]entences imposed pursuant to this section shall run consecutively with and shall commence at the expiration of any (other) sentence(s) being served by the person sentenced hereunder." Defendants argue the language of these statutes deals "with a subject in detail with reference to a particular situation (armed robbery)" while G.S. 15A-1354(b) "deals with the same subject in general and comprehensive terms" and, therefore, the armed robbery statutes control and negate the computation provisions of G.S. 15A-1354(b). *See State v. Leeper*, 59 N.C. App. 199, 201-02, 296 S.E.2d 7, 8-9, *disc. review denied*, 307 N.C. 272, 299 S.E.2d 218 (1982). As a result, defendants contend armed robbery sentences are not subject to being aggregated for parole eligibility purposes, and inmates sentenced for armed robbery only begin serving time at the completion of the prior sentence or upon having been "paper paroled" to the consecutive armed robbery sentence.

However, while G.S. 14-87 (c) and (d) dealt with when consecutive sentences should be imposed, G.S. 15A-1354(b) mandates how

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the Department of Correction must treat consecutive sentences once they have been imposed. *See* G.S. 15A-1354, Official Commentary ("Subsection (b) sets out the rules for calculating the effects of consecutive terms . . . in order to determine parole eligibility."). Contrary to defendants' assertions, the armed robbery statute applicable to the plaintiff did not mandate how consecutive sentences should be treated for determining parole eligibility. This Court has previously determined that the statutory language stating "[s]entences imposed pursuant to this section shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder" means only that a sentence for an armed robbery conviction must be consecutive to a prison term already in effect at the time of sentencing. *State v. Crain*, 73 N.C. App. 269, 271, 326 S.E.2d 120, 122 (1985). Where, as here, multiple armed robbery offenses are disposed of in the same sentencing proceeding, they are not required to be consecutive to one another. *Id.* Other than prescribing that a defendant must serve at least seven years of any sentence for armed robbery, G.S. 14-87(c) did not affect how consecutive sentences were to be treated for parole eligibility purposes once the consecutive sentences had been imposed. Further, we can find no statutory authority for defendants' practice of issuing "paper paroles." Therefore, plaintiff's sentences should be aggregated pursuant to G.S. 15A-1354(b) for purposes of determining parole eligibility.

[2] Plaintiff next contends that, for purposes of parole eligibility, he is entitled to a reduction of the seven-year minimum mandatory sentences required in cases 80-CRS-23443 and 80-CRS-23442 to the extent of any gain time granted under N.C. Gen. Stat. § 148-13. We disagree. The armed robbery statute in effect at the time plaintiff committed his crimes read as follows:

Any person who has been convicted of a violation of G.S. 14-87(a) shall serve the first seven years of his sentence without benefit of parole, probation, suspended sentence, or any other judicial or administrative procedure except such time as may be allowed as a result of good behavior, whereby the period of actual incarceration of the person sentenced is reduced to a period of less than seven years. . . .

Notwithstanding any other provision of law, neither the Parole Commission nor any other agency having responsibility for release of inmates prior to expiration of sentences, shall

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authorize the release of an inmate sentenced under this section prior to his having been incarcerated for seven years except such time as may be allowed as a result of good behavior.

G.S. 14-87(c). The statute allowed a reduction for good behavior, but made no provision for a reduction for gain time. Nevertheless, since G.S. 14-87(c) was repealed effective 1 July 1981, and plaintiff was sentenced on 1 April 1982, plaintiff argues G.S. 14-87(d), which he contends allows a reduction below the seven-year minimum for gain time earned, applies in his case. However, G.S. 14-87(d) applied only to offenses committed on or after 1 July 1981 and plaintiff's criminal charges arose in 1980. 1979 N.C. Sess. Laws ch. 760, § 6, as amended by 1979 N.C. Sess. Laws, 2nd Sess., ch. 1316, § 47; 1981, ch. 63, § 1; and 1981, ch. 179, § 14. Therefore, plaintiff is not entitled to have his sentences reduced below the seven-year minimum to the extent of gain time served.

Because of our decision, we need not address plaintiff's remaining argument. For the reasons stated, the order of the trial court is reversed.

Reversed.

Judge WYNN concurs in the result with separate opinion.

Judge JOHN concurs in the result and joins in Judge WYNN's opinion.

Judge WYNN concurring in the result only.

I disagree with our Court's earlier determination in *State v. Crain*, 73 N.C. App. 269, 326 S.E.2d 120 (1985) that N.C. Gen. Stat. § 14-87 does not require the imposition of consecutive sentences—for sentences imposed on multiple offenses under that section—where “the defendant is not yet serving a sentence for any of the counts at the time of the sentencing proceeding.” *Id.* at 271, 326 S.E.2d at 122. Instead, I agree with the State's interpretation of § 14-87 that our legislature intended that consecutive sentences for armed robberies be mandatory under that section rather than discretionary under N.C. Gen. Stat. § 15A-1354(a). In that light, § 15A-1354(b) would have no application in this case because “the consecutive sentences were [not] imposed under the authority of [Article 15A].” N.C. Gen. Stat. 15A-1354(b).

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Nevertheless, *Crain* represents binding precedence on this panel. See, *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989) (holding one panel may not overrule another panel). Under *Crain*, because the defendant in this case was not “serving a sentence for any counts at the time of the sentencing proceeding,” the trial court necessarily imposed the consecutive sentence terms under § 15A-1354(a). That being the case, § 15A-1354(b) applies and accordingly, I must concur with the result reached by the majority.

STATE OF NORTH CAROLINA v. LAVOISHA LUCREATA DOWNEY

No. COA96-1228

(Filed 5 August 1997)

Evidence and Witnesses § 1009 (NCI4th)—unavailable declarant—residual hearsay exception—trustworthiness—corroborating evidence—Confrontation Clause violation—prejudicial error

In a prosecution for murder, defendant's rights under the Confrontation Clause were violated by the admission of the testimony of an unavailable declarant identifying defendant as one of the murderers pursuant to the residual hearsay exception of Rule 804(b)(5) where the trial court relied solely on corroborating evidence in determining the trustworthiness of the hearsay evidence. In this case, the testimony was sharply conflicting as to defendant's guilt, and while the evidence of defendant's guilt was strong, it was not overwhelming; therefore, the trial court's error was not harmless beyond a reasonable doubt.

Appeal by defendant from judgment and commitment entered 4 April 1996 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 2 June 1997.

At trial, the State's evidence tended to show the following: On or about 18 April 1994, James Henderson and his nephew Tony Henderson stole a safe from the home of Peggy M. Brown. The safe belonged to the defendant, Lavoisha L. Downey, who had kept the safe in Ms. Brown's house since early April 1994. Defendant Downey allegedly used the safe to store drugs and money for herself and a man named Robert Tucker. When James and Tony Henderson stole the safe, the safe contained cocaine.

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On 19 April 1994, having discovered that her safe had been stolen, defendant Downey and her cohorts confronted James Henderson about the stolen safe. Upon being confronted, James Henderson told defendant Downey that another person he knew had the safe. While armed, defendant Downey and one of her cohorts, also armed, then forced Mr. Henderson to drive them to meet with the person who allegedly had the safe. Defendant Downey sat in the front passenger seat and held a gun to Mr. Henderson's head as he drove.

Mr. Henderson escaped injury at this time by luring defendant Downey and her accomplice out of the vehicle and then by accelerating wildly away in reverse. Friends of Mr. Henderson who viewed the incident from a distance, testified that at least two people stood in the street shooting at Mr. Henderson as he drove away. The location of bullet holes in the vehicle driven by Mr. Henderson tends to corroborate this testimony.

On 20 April 1994, James Henderson returned to the house in Durham where he had been confronted by defendant Downey the previous day. Mr. Henderson arrived at the house bleeding and with a number of shotgun pellets still embedded in his skin. At the house, Mr. Henderson's friends used tweezers and rubbing alcohol to remove the shotgun pellets and clean Mr. Henderson's wounds. Mr. Henderson stated to his friends that he had been shot by "Voisha and her gangster crew." Defendant Downey at times answered to and was known by the nickname, "Voisha."

Three days later, on 23 April 1994, James Henderson rode his motorcycle down Alston Avenue in Durham. While on Alston Avenue, Mr. Henderson was approximately one block behind a car containing his nephew Tony Henderson and one other man. As Tony Henderson stopped his car at a red light, he noticed James Henderson pulling his motorcycle to a halt at a stop sign at the previous intersection. Tony Henderson motioned for James Henderson to join him at a nearby gas station and James Henderson indicated by motioning that he would do so. Before James Henderson could do so, however, defendant Downey and two others approached him from behind firing their weapons repeatedly and fatally wounding James Henderson before he could escape.

The defense presented four witnesses who testified that they saw only two people, both males, shoot at Mr. Henderson on 23 April 1994. Two other witnesses testified on defendant's behalf in support of her alibi theory. Their testimony placed defendant at Jocelyn Simms'

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apartment home at the time of the murder. The defense also introduced a 911 call describing the shooting as having been perpetrated solely by two males. Defendant Downey testified on her own behalf and denied any part in the murder of James Henderson. After trial on 25 March 1996, the jury returned a verdict of first degree murder against defendant Downey and the trial court imposed a sentence of life imprisonment.

Defendant appeals.

Attorney General Michael F. Easley, by Special Deputy Attorney General Thomas F. Moffitt, for the State.

Mark E. Edwards for defendant-appellant.

EAGLES, Judge.

Defendant argues that the trial court erred in admitting an eyewitness's out-of-court statement under the residual exception to the hearsay rule. G.S. 8C-1, Rule 804(b)(5) (1983). Defendant contends that admission of the statement here implicated the Confrontation Clause of the Sixth Amendment to the United States Constitution because the trial court relied solely on corroborating evidence in determining the inherent trustworthiness of the unavailable declarant's statement. In light of our Supreme Court's recent decision in *State v. Tyler*, 346 N.C. 187, 485 S.E.2d 599 (1997), we agree.

Four days after the shooting, an alleged eyewitness to the shooting, Eddie Roper, gave police a signed statement identifying defendant as one of the murderers. Mr. Roper stated that he knew the defendant well and had known her for approximately eight years prior to the shooting. Mr. Roper stated that defendant had a child with his brother, Darrell Roper. At the time of trial, Mr. Eddie Roper failed to respond to the State's subpoena. The State argued that Mr. Roper had become unavailable and moved to introduce his signed statement under the residual hearsay exception in Rule 804(b)(5).

"Rule of Evidence 804(b)(5) provides for the admission of hearsay statements when the declarant is unavailable and the statement is not covered by any specific exception, but is determined to have 'equivalent circumstantial guarantees of trustworthiness.'" *State v. Swindler*, 339 N.C. 469, 473, 450 S.E.2d 907, 910 (1994) (quoting G.S. 8C-1, Rule 804(b)(5)). Rule 804(b)(5) is considered to be a "residual" hearsay exception, rather than a "firmly rooted" one, *Tyler*, 346 N.C. at 200, 485 S.E.2d at 606 (1997), and hearsay statements

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offered under Rule 804(b)(5) are deemed “presumptively unreliable and inadmissible for Confrontation Clause purposes.” *Idaho v. Wright*, 497 U.S. 805, 818, 111 L. Ed. 2d 638, 654 (1990). When offered under a “residual” exception, the Confrontation Clause requires exclusion of the out-of-court statement “unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial. . . .” *Wright*, 497 U.S. at 821, 111 L. Ed. 2d at 656.

“[E]ven if certain hearsay evidence does not fall within ‘a firmly rooted hearsay exception’ and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a ‘showing of particularized guarantees of trustworthiness’ ” *Id.* at 817, 111 L. Ed. 2d at 653 (quoting *Lee v. Illinois*, 476 U.S. 530, 543, 90 L. Ed. 2d 514, 527-28 (1986)). The statement must possess the requisite circumstantial guarantees of trustworthiness based on the “totality of circumstances that surround the making of the statement. . . .” *Id.* at 820, 111 L. Ed. 2d at 655-56. The court should consider:

- (1) assurances of the declarant’s personal knowledge of the underlying events,
- (2) the declarant’s motivation to speak the truth or otherwise,
- (3) whether the declarant has ever recanted the statement, and
- (4) the practical availability of the declarant at trial for meaningful cross-examination.

State v. Triplett, 316 N.C. 1, 10-11, 340 S.E.2d 736, 742 (1986). If the court is to allow admission of hearsay evidence under Rule 804(b)(5), the statement “must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial.” *Wright*, 497 U.S. at 822, 111 L. Ed. 2d at 657. Corroborating evidence cannot be relied upon “in finding the circumstantial guarantees of trustworthiness required in order to protect defendant’s rights under the Confrontation Clause of the United States Constitution.” *Tyler*, 346 N.C. at 202, 485 S.E.2d at 607.

The trial court here conducted a hearing outside the presence of the jury and entered an order concluding in relevant part “[t]hat the statement [by Mr. Roper] is trustworthy in that it is corroborated by physical evidence and statements of witnesses. . . .” In deciding to admit Mr. Roper’s statement the trial court made eight findings of fact, every one based solely on the presence of corroborating evidence, supporting its conclusion that Mr. Roper’s statement pos-

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sessed the requisite circumstantial guarantees of trustworthiness to be admissible under Rule 804(b)(5). We conclude that the trial court committed prejudicial error here in basing its determination of the statement's trustworthiness on the presence of corroborating evidence. *Tyler*, 346 N.C. at 202, 485 S.E.2d at 607. This error implicated defendant's rights under the Confrontation Clause. *Id.*

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." G.S. 15A-1443(b) (1977). "The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." *Id.* We conclude that the State has not carried this burden here.

The evidence here is sharply conflicting. Aside from Mr. Roper's statement, the State presented three witnesses who testified that they saw defendant Downey shoot Mr. Henderson. Forensic evidence, though not conclusive, also tended to support the contention that defendant Downey was guilty. Furthermore, the State presented strong evidence of defendant Downey's motive and intent to murder Mr. Henderson.

On the other hand, defendant presented six witnesses here in support of her alibi theory. Defendant also testified in her own defense and denied any participation in the crime. Each of the three State's witnesses placing defendant Downey at the scene could be characterized on cross-examination as biased due to their close ties to Mr. James Henderson. At least one of the witnesses, Tony Henderson, likely had reason to fear for his own safety if defendant Downey went free because he too had allegedly participated in the theft of defendant Downey's safe. It is possible that the jury considered Mr. Roper's statement, which we have held was improperly admitted here, to be more credible than the three witnesses' testimony because of Mr. Roper's apparently closer affiliation and allegiance to defendant Downey than to the slain Mr. Henderson.

In sum, while the State's evidence of record is strong, it is not overwhelming, and on this record we cannot conclude as a matter of law that the trial court's error was harmless beyond a reasonable doubt. Our role as a reviewing court is not to judge whether a defendant is a good citizen or not, but only to ensure that every citizen is fairly and equally afforded the fair trial guaranteed by the United States Constitution. We note also here that defendant Downey assigns error to the prosecution's improperly calling defendant Downey's

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character into question. Assuming arguendo that this was error, we are confident that this error will not be repeated on remand and, if so, that the trial court will give a adequate curative instruction so as to avoid any prejudice to defendant Downey. We need not address defendant Downey's remaining assignments of error.

New trial.

Judges McGEE and SMITH concur.

DANIEL ELLINGTON, AND WIFE, KAY ELLINGTON, APPELLANTS V. DAVID HESTER,
AND WIFE, LINDA HESTER, APPELLEES

No. COA96-1057

(Filed 5 August 1997)

**Environmental Protection, Regulation, and Conservation § 84
(NCI4th)— contamination of well water—leaking under-
ground tank on adjacent property—failure to prove causal
connection**

In an action in which plaintiffs seek to recover under theories of strict liability under the Oil Pollution and Hazardous Substances Control Act, negligence, nuisance and trespass for the contamination of their well water by petroleum that allegedly leaked from an underground storage tank on defendants' adjacent property, the trial court properly granted defendants' motion for a directed verdict because plaintiffs failed to establish a causal connection between the leakage of gasoline from defendants' underground tank and contaminants found in plaintiffs' well water where plaintiffs' expert witnesses testified that they did not have sufficient evidence to determine that leakage from this tank was the source of the contamination of plaintiffs' well.

Appeal by plaintiff from Order entered 3 April 1996 by Judge W. Steven Allen in Randolph County Superior Court. Heard in the Court of Appeals 12 May 1997.

The plaintiffs, Mr. and Mrs. Ellington, own and occupy a residence located in Archdale, Randolph County, North Carolina. The plaintiffs' property is used primarily as a residence, however, Mr.

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Ellington operates a car refurbishing business in the detached garage behind their home. The plaintiffs' property is served by a 150 foot deep well.

The defendants, Mr. and Mrs. Hester, own the tract adjacent to the plaintiffs' property. The Hester property consists of the Hester residence, a garage, and fourteen mobile homes which the Hesters operate as a rental park. The plaintiffs' and defendants' property share the same aquifer which is the sole source of fresh water for the plaintiffs' household use.

In January 1994, the plaintiffs noticed that their drinking water had a foul odor and a bad taste and the plaintiffs developed skin irritations from contact with the water. Plaintiffs contacted the Division of Environmental Management of the North Carolina Department of Environment, Health, and Natural Resources (DEHNR). DEHNR took water samples from the plaintiffs' well. After several tests, DEHNR determined that the plaintiffs' water contained benzene (a chemical known to cause cancer in humans), xylene, 1,3,5 trimethylbenzene, methyltertbutylether (MTBE), and methylene. MTBE and benzene are components found in gasoline and petroleum products.

Steve Williams, a hydrologist with DEHNR, came to the area to investigate potential sources of the contamination. In the course of his investigation, Steve Williams inquired whether the defendants were aware of the presence of any underground petroleum storage tanks on their property. The defendants first said "no," but several days later, informed DEHNR about the existence of two abandoned underground storage tanks (UST) on their property. Mr. Hester indicated that the tanks had not been used for years.

With the assistance of the defendants, DEHNR located two USTs on the defendants' property; one 275 gallon tank and one 1000 gallon tank. The defendants' USTs were located "a couple hundred feet" upgradient from the Ellington well. Both USTs had been used in the past for gasoline storage. As part of an earlier renovation, the defendants had filled the smaller 275 gallon tank with concrete. Neither UST contained gasoline at the time of DEHNR's on-site investigation. On 30 August 1994, DEHNR supervised the closure and removal of both USTs from the defendants' property. After both USTs were removed, Steve Williams took soil samples from the area of the USTs for testing. Tests on the soil samples indicated there had been a release of gasoline from the larger (1000 gallon) tank. On 17 October 1994, DEHNR notified the defendants that tests indicated a release of gaso-

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line from the 1000 gallon tank had occurred and that as owners and operators of the tank, the defendants were "required . . . to immediately undertake to collect and remove the discharge or release and to restore the area affected." Based on their financial inability to clean up the site, the defendants applied for and were accepted into a State program allowing North Carolina to "assume the lead" in evaluating and cleaning up the affected site. The State retained S&ME, a private environmental consulting firm, to evaluate and set up monitoring wells on the site.

On 24 March 1995, the Ellingtons filed suit against the Hesters under the Oil Pollution and Hazardous Substances Control Act of 1978 (OPHSCA), N.C.G.S. 143-215.75 *et seq.*, alleging negligence, nuisance and trespass arising from the contamination of the Ellingtons' well water with gasoline. In their complaint, plaintiffs alleged that since June 1994, the plaintiffs' drinking water "was discolored, had a foul odor, and bad taste, and irritated their skin" and that "[t]he State of North Carolina, Department of Environmental, Health, and Natural Resources, further advised the Plaintiffs that it had identified the underground storage tanks located at the Hester property as a probable source of the contamination of the Plaintiffs' groundwater." The plaintiffs complained that as a result of the gasoline contamination, their "well water is no longer safe for drinking or other household purposes" and they have "suffered expenses for alternate sources of water and other expenses, personal injury, pain and suffering, diminution in value, fear of future disease, increased likelihood of future disease and physical problems, diminished quality of life and mental distress."

At the close of the plaintiffs' evidence, defendants moved for a directed verdict which the trial court allowed. Plaintiffs appeal.

Nancy P. Quinn for plaintiff-appellants.

Hill, Evans, Duncan, Jordan & Davis, by R. Thompson Wright, for defendant-appellees.

EAGLES, Judge.

By their sole assignment of error, the plaintiffs contend that the trial court erred in granting the defendants' motion for a directed verdict on each of the plaintiffs' claims, i.e. strict liability under the Oil Pollution and Hazardous Substances Control Act (G.S. 143-215.75, *et seq.*), negligence, nuisance and trespass. We disagree and affirm.

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The purpose of a motion for a directed verdict is to test the legal sufficiency of the evidence. *Hinson v. National Starch & Chemical Corp.*, 99 N.C. App. 198, 201, 392 S.E.2d 657, 659 (1990). "In deciding the motion, the trial court must treat non-movant's evidence as true, considering the evidence in the light most favorable to the non-movant, and resolving all inconsistencies, contradictions and conflicts for non-movant, giving non-movant the benefit of all reasonable inferences drawn from the evidence." *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350 (1990). To overcome a motion for a directed verdict and take the question of causation to the jury, the plaintiff's evidence must indicate a "reasonable scientific probability that the stated cause produced the stated result." *Hinson*, 99 N.C. App. at 202, 392 S.E.2d at 659. "When evidence raises a mere conjecture, surmise, and speculation as to causation, it is insufficient to present a question of causation to the jury." *Id.* (citations omitted).

Causation is the common element at issue in each claim asserted here by the plaintiffs. The Oil Pollution and Hazardous Substances Control Act provides:

Any person having control over oil or other hazardous substances which enters the waters of the State in violation of this Part shall be strictly liable, without regard to fault, for damages to persons or property, public or private, caused by such entry. . . .

N.C.G.S. 143-215.93 (1996). In order to establish an actionable claim for negligence, the plaintiff must show that the defendant's breach of duty proximately caused the plaintiff's injury. *Westbrook v. Cobb*, 105 N.C. App. 64, 67, 411 S.E.2d 651, 653 (1992). To sustain an action for nuisance, the plaintiff must show that the defendant's actions caused him substantial damage. *Pendergrast v. Aiken*, 293 N.C. 201, 216, 236 S.E.2d 787, 796 (1977). Furthermore, an action for trespass to real property requires plaintiff show that defendant's unauthorized entry onto plaintiff's property caused damage to plaintiff's property. *Kuykendall v. Turner*, 61 N.C. App. 638, 642, 301 S.E.2d 715, 718 (1983).

In *Masten v. Texas Co.*, 194 N.C. 540, 140 S.E. 89 (1927), all the plaintiff was required to show was that his well was polluted by gasoline from the tank owned and maintained by the defendant. *Broughton v. Oil Co.*, 201 N.C. 282, 288, 159 S.E. 321, 323 (1931). The Supreme Court concluded that evidence showing that the defendants installed a gasoline tank and pump one hundred and thirty feet upgradient from the plaintiff's well; that the defendant's tank was the only

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tank "within half a mile or more of the plaintiffs' home"; and, that the plaintiff's well became contaminated with gasoline after the installation of the defendant's gasoline tank was "more than a scintilla, and sufficient to be submitted to a jury." *Masten*, 194 N.C. at 541, 140 S.E. at 90. However, the Supreme Court has since held that evidence that the defendant's contaminated site is a "possible" source of the plaintiff's contamination is a "slender reed upon which to base causation" and an insufficient forecast of evidence. *Wilson v. McLeod Oil Co.*, 327 N.C. 491, 522, 398 S.E.2d 586, 602-03 (1990) (expert testimony stating "that's possible" when asked if the water flow direction could be different at a lower aquifer was not sufficient to establish causation and survive the summary judgment motion). Furthermore, expert testimony which establishes only that contaminants "could travel" to the plaintiff's property, not that the contaminants "actually traveled" to the plaintiff's property, is not sufficient to withstand a motion for summary judgment on the issue of causation. *Ammons v. Wysong & Miles Co.*, 110 N.C. App. 739, 746, 431 S.E.2d 524, 529 (1993); *Cf. James v. Clark*, 118 N.C. App. 178, 454 S.E.2d 826 (1995) (expert testimony identifying the defendant's site as the only potential source of contamination and stating that the plaintiff's well is heavily contaminated with gasoline from the defendant's leakage is sufficient to create a genuine issue of material fact).

Here, the plaintiffs have failed to show that a release of gasoline from the UST located on the defendants' property caused the contamination in the plaintiffs' well water. Plaintiffs offered the testimony of several expert witnesses at trial. Steve Williams, a hydrologist employed by DEHNR, investigated potential sources of contamination of the plaintiffs' well water. Mr. Williams testified that the plaintiffs' well water was contaminated with gasoline and that soil tests indicated that there had been a release of gasoline from the defendants' 1000 gallon tank sufficient to leave "a strong odor of gasoline in the soil" removed from underneath the excavated tank. Although Mr. Williams testified that after he "looked around the area" he "didn't see any other possible source . . . [o]f contamination," when asked if he was willing to state an opinion "that Mr. Hester's gasoline around there was the cause of the Ellington's problem," he answered that he did not have "sufficient evidence" to determine that the Hesters' UST was the source of the contamination of the Ellington well.

The plaintiffs also offered the expert testimony of J.D. Barker, an environmental engineer employed by S&ME Environmental Consulting. Mr. Barker never actually visited either the Hester or the

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Ellington properties, but had reviewed the information collected by DEHNR. Mr. Barker testified that he had not been able to determine the direction of the ground water flow under the Hester property. He also testified that he was not aware of any contamination in the two wells located on the defendants' property and that "there's not been any contamination in the Williard well which is the next-door neighbor to the Ellingtons." Mr. Barker also testified that he had not "been able to identify the source of the contamination" of the plaintiffs' well. Furthermore, the S&ME "Preliminary Site Assessment" dated 23 February 1996 states "[a]t this time, there is insufficient data to identify the cause or combination of causes for the presence of ground-water contaminants" in the plaintiffs' well water.

To establish a claim for damages caused by the contamination of well water, a plaintiff must offer more than evidence of the contamination of their water and a release of contaminants in the area. The plaintiffs here did not offer any evidence establishing a causal connection between the defendants' release of gasoline from the 1000 gallon UST and the contaminants found in the plaintiffs' well water. Accordingly, we hold that the plaintiffs failed to present a sufficient forecast of evidence to survive the defendants' motion for a directed verdict.

Affirmed.

Judges McGEE and SMITH concur.

M. B. HAYNES CORPORATION, PLAINTIFF v. STRAND ELECTRO CONTROLS, INC.,
A UTAH CORPORATION, DEFENDANT

No. COA96-451

(Filed 5 August 1997)

1. Workers' Compensation § 72 (NCI4th)— action against negligent third party—damages—increased workers' compensation insurance premiums—settlement

The trial court properly granted summary judgment in favor of defendant in a tort action seeking as damages the increases in workers' compensation premiums incurred as result of payments to an employee injured as a result of defendant's negligence

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where plaintiff had approved a settlement between the injured employee and defendant which released defendant from all claims and demands arising out of the employee's injuries.

2. Workers' Compensation § 74 (NCI4th)— action by employer against negligent third party—increased premiums as damages—limited to recovery of benefits paid

The trial court correctly granted defendant's motion for summary judgment where plaintiff, the employer of an injured worker, sought to recover increases in workers' compensation premiums from defendant, a negligent third-party. The provisions of N.C.G.S. § 97-10.2 reflects the General Assembly's intent to limit an employer to recovery of workers' compensation benefits it has paid its employee.

Appeal by plaintiff from order entered 31 January 1996 by Judge Ronald E. Bogle in Buncombe County Superior Court. Heard in the Court of Appeals 9 January 1997.

Long, Parker & Warren, P.A., by W. Scott Jones and Kimberly A. Lyda, for plaintiff-appellant.

Roberts & Stevens, P.A., by Wyatt S. Stevens and Isaac N. Northup, Jr., for defendant-appellee.

JOHN, Judge.

Plaintiff M.B. Haynes Corporation appeals the trial court's entry of summary judgment in favor of defendant Strand Electro Controls, Inc. The trial court rejected plaintiff's assertion of a cause of action against defendant to recover increases in workers' compensation insurance premiums allegedly incurred as a result of plaintiff's payment of workers' compensation benefits to an employee injured by the negligence of defendant. We affirm the trial court.

Pertinent factual and procedural information includes the following: On 1 July 1991, Warren Dale Chandler (Chandler) was in the employ of plaintiff, an electrical contractor. On that date, Chandler's duties involved servicing a dimming equipment cabinet manufactured by defendant. Chandler suffered severe electric shock while working on the cabinet, which allegedly was not properly grounded.

Chandler filed a workers' compensation claim against plaintiff with the North Carolina Industrial Commission (the Commission). He ultimately received eighty weeks of temporary total disability bene-

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fits, totaling \$22,933.62, and medical benefits amounting to \$13,165.66. Chandler also instituted a negligence action against defendant, alleging it had breached its duty of care in the design and assembly of the dimming equipment cabinet.

Defendant and Chandler thereafter entered into a settlement agreement awarding the latter \$92,500, and the Commission ordered distribution of the funds pursuant to N.C.G.S. § 97-10.2 (1991). Plaintiff and its adjusting agent received \$12,000 from the settlement in “full settlement of their subrogation interest” in the third party award. In exchange for plaintiff’s acceptance of this reduced portion of the third party award (plaintiff’s full subrogation interest was calculated to total \$38,209.06), Chandler agreed to release plaintiff from any further liability under the Workers’ Compensation Act.

Shortly thereafter, plaintiff brought the instant suit against defendant, alleging negligence and breach of the warranty of merchantability in its manufacture and sale of the dimming equipment cabinet. Plaintiff claimed defendant’s tortious conduct had caused injury to plaintiff’s employee Chandler who had been paid a sizable sum in workers’ compensation benefits. As a result, plaintiff continued, its workers’ compensation insurance premiums had “substantially increased and will continue to be higher than they otherwise would be if Plaintiff’s employee had not been injured.” An affidavit of plaintiff’s Safety Director later filed with the court asserted an increase in premiums of over \$50,000 during the period of 1993 to 1996 as a direct result of Chandler’s 1991 injury.

Defendant’s answer included the affirmative defense that plaintiff’s action was barred because it had participated in the settlement agreement with defendant regarding Chandler’s suit. Defendant’s motion for summary judgment was granted by the trial court in an order entered 31 January 1996. Plaintiff filed notice of appeal to this Court 19 February 1996.

[1] The dispositive issue before this Court is whether an employer—whose workers’ compensation insurance premiums have risen as the result of an employee’s injury by a third party—may maintain a cause of action against the third party to recover its increased insurance costs. Numerous jurisdictions which have considered this question have answered it in the negative, *see Schipke v. Grad*, 562 N.W.2d 109, 112 (S.D. 1997) (listing the cases), some deciding the action was precluded by their respective state workers’ compensation statutes, *see*,

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e.g., *Erie Castings Co. v. Grinding Supply, Inc.*, 736 F.2d 99 (3rd Cir. 1984) (applying Pennsylvania law), and others ruling the employer's economic harm was too remote a result of the tortfeasor's conduct to allow recovery, *see, e.g.*, *RK Constructors, Inc. v. Fusco Corp.*, 650 A.2d 153 (Conn. 1994). *See generally* 7 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 77.30 (1996) (noting problematical situation of employers with no cause of action against third party for increase in premiums *and* no subrogation rights in employee's third party award). We conclude plaintiff's actions herein as well as our statutory provisions delineating "rights and remedies against third parties" in the workers' compensation context sustain the ruling of the trial court.

The pertinent section, G.S. § 97-10.2(a), states:

The respective rights and interests of the employee-beneficiary under this Article, the employer, and the employer's insurance carrier, if any, in respect of the common-law cause of action against such third party and the damages recovered shall be as set forth in this section.

The statute goes on to provide that the employee (or the employee's representative) "shall have the exclusive right to proceed to enforce the liability of the third party" for the first 12 months following his or her injury or death; further, during this period, the employee "shall have the right to settle with the third party and to give a valid and complete release of *all claims to the third party by reason of such injury or death.*" G.S. § 97-10.2(b) (emphasis added). Upon expiration of the initial 12 month period, either the employee or the employer may proceed against the tortfeasor. G.S. § 97-10.2(c). Again, the party bringing such action may settle with, and release all claims against, the tortfeasor. *Id.*

In the case *sub judice*, Chandler, the employee, initiated a tort action against defendant, the third party, to recover for injuries sustained on the job. Chandler thereafter entered into a settlement agreement with defendant, which settlement was approved by plaintiff, Chandler's employer. The settlement agreement by its terms released defendant "from all claims and demands, rights and causes of action of any kind" that Chandler might have arising out of his injury, and Chandler agreed "to indemnify and save harmless" defendant "from and against all claims and demands whatsoever" growing out of the incident. Thus, plaintiff was thereby precluded from bringing another cause of action against defendant for damages arising out

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of Chandler's injury. *See* G.S. § 97-10.2(c); *cf. Keith v. Glenn*, 262 N.C. 284, 286, 136 S.E.2d 665, 667 (1964) (settlement binding on parties to agreement *and* those who knowingly accept its benefits).

[2] In addition, the full provisions of G.S. § 97-10.2 reveals a statutory scheme whereby employers are limited to recovery of benefits they have paid to an employee.

First, G.S. § 97-10.2(d) indicates suit against the tortfeasor must be brought in the name of the employee or his personal representative and the employer or the insurance carrier shall not be a necessary or proper party thereto.

Without question, an employer not properly a party to the third party action may not present therein evidence of increased insurance costs. Rather, the evidence will be limited to damages suffered by the employee. *See Shipke*, 562 N.W.2d at 112 (holding, under state workers' compensation statute, employer has no more rights against negligent third party than employee).

Further, while an employee generally must obtain approval of the employer before settling with a tortfeasor and releasing all claims, G.S. § 97-10.2(h), the employer's authorization is not required "[i]f the employer [has been] made whole for all benefits paid or to be paid by him" under the Workers' Compensation Act, G.S. § 97-10.2(h)(1). The statutory language indicates legislative concern that employers have a means to recover benefits paid to an employee, but no more.

In sum, G.S. § 97-10.2 delineates the "rights and remedies against third parties," in the worker's compensation context, and the section mandates that they "*shall* be as set forth," G.S. § 97-10.2(a) (emphasis added). The statute thus reflects the General Assembly's intent to limit an employer to recovery of workers' compensation benefits it has paid its employee. *See Shipke*, 562 N.W.2d at 113 (employer's cause of action "cannot be extended beyond what was authorized by the Legislature").

Based on the foregoing, we hold the trial court properly granted defendant's motion for summary judgment in that plaintiff was precluded as a matter of law from maintaining a cause of action against defendant to recover increases in workers' compensation insurance premiums. *See* N.C.R. Civ. P. 56(c) (summary judgment properly granted where party "is entitled to a judgment as a matter of law").

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Affirmed.

Judges COZORT and MCGEE concur.

Judge COZORT concurred prior to 31 July 1997.

STATE OF NORTH CAROLINA v. JAMES EDWARD ALLEN

No. COA96-910

(Filed 5 August 1997)

1. Homicide § 370 (NCI4th)— second-degree murder—aiding and abetting—“friend exception”—sufficient evidence

There was sufficient evidence to support defendant's conviction of second-degree murder based upon aiding and abetting where the evidence at trial indicated that defendant was aware of the murderer's intent to kill the victim, defendant accompanied the murderer and other men as they took the victim to the murder scene in a van, and defendant was at the scene of the murder, standing and watching as the victim was shot. This evidence coupled with the evidence that defendant and the murderer were friends was sufficient, under the “friend exception,” to support an inference that defendant, by his presence, had communicated that he was willing to assist in the crime if it became necessary.

2. Evidence and Witnesses § 875 (NCI4th)— misapplication of “state of mind” hearsay exception—prejudicial error

Testimony by a witness in a second-degree murder prosecution that her mother told her that defendant threatened by telephone to harm the witness if she came to court was hearsay and improperly admitted under the state of mind exception to the hearsay rule. Furthermore, the admission of the testimony was prejudicial error since the testimony could clearly have caused the jury to believe defendant was attempting to repress the witness's testimony of defendant's involvement in the crime and to disbelieve defendant's testimony that he was not present during the crime, and it cannot be said that there is no reasonable possibility that a different result would have been reached if the testimony had been excluded. N.C.G.S. § 8C-1, Rule 801(c).

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On writ of *certiorari* from judgment entered 17 November 1994 by Judge Catherine C. Eagles in Forsyth County Superior Court. Heard in the Court of Appeals 30 April 1997.

Attorney General Michael F. Easley, by Associate Attorney General Bruce S. Ambrose, for the State.

Lawrence J. Fine for defendant-appellant.

MARTIN, John C., Judge.

Defendant was charged with the second degree murder of Louis Lopez. He entered a plea of not guilty and was tried jointly with a co-defendant, Christopher Mosby. Briefly summarized, the State's evidence at trial tended to show that on the evening of 20 January 1994, Louis Lopez, Christopher Mosby, Thomas Williams, David Wanner, Tammy Clowers, Pamela Lowery, and defendant were all present at defendant's apartment in Winston-Salem. Thomas Williams was cutting crack cocaine in defendant's kitchen. After Williams finished cutting the cocaine, he, Mosby, Lopez, and defendant went into a bedroom where Williams confronted Lopez about some "merchandise" being "messed up." There was evidence tending to show that Williams, Mosby, Wanner, and defendant escorted Lopez out of the apartment and into a van. Williams instructed Wanner to shut and lock the door to the vehicle so that Lopez could not get out. Williams drove the van, with defendant sitting in the right front seat and the other men in the back, to Washington Park. All five men got out of the van and, while defendant and Wanner stood next to the van, Williams and Mosby took Lopez to the edge of the woods. While Mosby held Lopez, Williams shot him in the head and in the chest. Williams and Mosby then carried his body deeper into the woods and returned to the van, where Williams threatened the other men if they said anything about the killing.

Defendant offered evidence tending to show that while they were at the apartment, Williams told defendant that he was going to kill Lopez because Lopez did not have some money that he was supposed to bring Williams. Defendant attempted to dissuade Williams, and thought he had been successful because Williams seemed to calm down and told defendant, "All right, . . . I'll be back. I'm fixing to drop him off." Williams, Mosby, Lopez, and a fourth man, Eugene Hairston, got their coats and left the apartment. Defendant, Wanner, Clowers, and Lowery stayed at the apartment, drinking beer. About twenty minutes later, Williams, Mosby, and Hairston returned to the apart-

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ment; Lopez was not with them. Williams told defendant that he had killed Lopez. Defendant testified that he and Williams were close friends, that they confided in each other, and that Williams looked up to him.

Defendant's motion to dismiss made at the close of all the evidence was denied. The jury found defendant guilty of second degree murder and the trial court entered judgment upon the verdict and sentenced defendant to an active term of imprisonment for forty years. Defendant petitioned for a writ of *certiorari* to review his conviction which was allowed by this Court on 18 March 1996.

[1] By his first assignment of error, defendant contends the trial court erred by denying his motion to dismiss the charge of second degree murder. He contends there was insufficient evidence that he aided or abetted in the murder of Louis Lopez. We disagree.

In ruling upon a criminal defendant's motion to dismiss, the trial court must decide whether there is substantial evidence of each element of the offense charged. *State v. Jackson*, 74 N.C. App. 92, 327 S.E.2d 270 (1985). Substantial evidence is understood to mean evidence that is existing, not just seeming or imaginary. *State v. Smith*, 40 N.C. App. 72, 252 S.E.2d 535 (1979). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference of fact which may reasonably be deduced therefrom. *State v. Stanley*, 74 N.C. App. 178, 327 S.E.2d 902, *disc. review denied*, 314 N.C. 546, 335 S.E.2d 318 (1985). Contradictions or discrepancies in the evidence must be resolved by the jury and do not warrant dismissal of the charges. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). Defendant's evidence is not to be considered by the trial court, unless such evidence is favorable to the State. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984).

In this case, defendant was convicted on the theory that he aided and abetted Williams in the murder of Lopez. "An aider or abettor is a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates or encourages another to commit the offense." *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981). The defendant must be present at the scene of the crime with the intent to aid the perpetrator should his assistance become necessary and such intent must be communicated to the perpetrator. *State v. Burton*, 119 N.C. App. 625, 460 S.E.2d 181

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(1995). Communication of intent to the perpetrator may be inferred from the defendant's actions and from his relation to the perpetrator. *Id.* A defendant's mere presence at the scene of the crime, even though he may silently approve of the criminal act and do nothing to prevent it, is not sufficient to make him guilty of the crime. *State v. Rankin*, 284 N.C. 219, 200 S.E.2d 182 (1973). However, presence alone may be sufficient when the bystander is a friend of the perpetrator and the perpetrator knows the friend's presence will be regarded as encouragement and protection. *State v. Cassell*, 24 N.C. App. 717, 212 S.E.2d 208, *cert. denied*, 287 N.C. 261, 214 S.E.2d 433 (1975), *citing State v. Hargett*, 255 N.C. 412, 121 S.E.2d 589 (1961).

Applying the foregoing principles to the evidence in the present case, we find no error in the trial court's denial of defendant's motion to dismiss. Viewed in the light most favorable to the State, there was evidence tending to show that defendant was aware of William's intent to kill Lopez and, with such knowledge, accompanied Williams and the other men as they took Lopez from the apartment to the van, and drove him to the place where he was killed. There was also evidence tending to show that defendant was present at the scene of the murder, standing next to the van with David Wanner, and that the two men watched as Thomas Williams shot Lopez. This evidence, considered together with the evidence of defendant's longstanding friendship with Mr. Williams, is sufficient, under the "friend exception," to support an inference that defendant, by his presence, communicated to Williams his intent to render aid in the commission of the crime should it become necessary. *See State v. Rankin, supra*. Therefore, the trial court properly dismissed defendant's motion to dismiss based on insufficiency of the evidence.

[2] By his next three assignments of error, defendant contends that he is entitled to a new trial by reason of the trial court's erroneous admission of hearsay testimony by Tammy Clowers regarding an alleged threat made by defendant to Ms. Clowers' mother over the telephone. During the State's redirect examination of Tammy Clowers, she testified that she had received threats. The following exchange took place:

Q. (by the prosecutor) Miss Clowers, who have you been receiving those threats from?

A. From what my mother said, it was James Allen.

Mr. Boyles: Objection.

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The Court: Overruled.

Q. And what did your mother tell you about the threat that she—that she had received from James Allen and what was the nature of the threat?

Mr. Boyles: Objection.

The Court: Overruled.

A: That if I did come to court that I was gone.

The court instructed the jury that it could consider the testimony to assist it “in evaluating [Ms. Clowers’] credibility and her state of mind as she testifies here before you today,” apparently holding the testimony admissible pursuant to the hearsay exception contained in N.C. Gen. Stat. § 8C-1, Rule 803(3).

Hearsay is defined as a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801(c). Hearsay evidence is not admissible unless it is made so by a statutory hearsay exception. N.C. Gen. Stat. § 8C-1, Rule 802. Ms. Clowers’ testimony concerning her mother’s statement to her is clearly hearsay because its probative value, even for the limited purpose for which the trial court allowed it, is dependent upon the truth of the matter asserted, i.e., that defendant had threatened to harm Ms. Clowers if she testified. The trial court’s admission of the hearsay testimony was a misapplication of the “state of mind” exception contained in Rule 803(3), which permits hearsay testimony to show the state of mind of the *declarant*, not the witness who testifies concerning the statement.

The erroneous admission of hearsay testimony is not always so prejudicial as to require a new trial, *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986), and the burden is on the defendant to show prejudice. N.C. Gen. Stat. § 15A-1443(a). Prejudicial error occurs when there is a reasonable possibility that, had the error not been committed, a different result would have been reached. *Id.*

In this case, the State presented evidence, including Ms. Clowers’ testimony, that defendant left the apartment with Williams, Lopez, and the other men and was present when Lopez was killed; defendant testified that he remained at the apartment and was not involved in the killing. Ms. Clowers’ inadmissible hearsay testimony concerning her mother’s statement that defendant had threatened to harm her if

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she came to court could clearly have caused the jury to believe that defendant was attempting to repress her testimony concerning his involvement in the crime, and to disbelieve defendant's own testimony that he was not present. Thus, we are unable to say that there is no reasonable possibility that a different verdict would have been reached had Ms. Clowers' hearsay testimony concerning the alleged threat been excluded. The error entitles defendant to a new trial.

New trial.

Judges COZORT and MCGEE concur.

Judge Cozort concurred in this opinion on or before to 31 July 1997.

FRANKLIN CREDIT RECOVERY FUND, XXI, L.P., A VIRGINIA LIMITED PARTNERSHIP,
PLAINTIFF-APPELLANT V. IN THE MATTER OF THE FORECLOSURE OF DEEDS OF TRUST OF:
W. DEAN HUBER AND WIFE, ELLEN B. HUBER; MICHAEL R. FERRARO AND WIFE,
SANDRA E. FERRARO, DEFENDANTS-APPELLEES

No. COA96-1297

(Filed 5 August 1997)

**Negotiable Instruments and Other Commercial Paper § 58
(NCI4th)— promissary note—old loans—refinancing and
cancellation—consideration**

A negotiable promissary note executed by two business partners and their wives to refinance, pay and cancel three preexisting lines of credit executed by the partners was given for value so that consideration was present as a matter of law, even if there was no antecedent debt for which all makers were jointly responsible. N.C.G.S. § 25-3-303(a)(1) and (3).

Appeal by plaintiff from orders entered 10 May 1996 and 12 July 1996 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 22 May 1997.

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by
Jim W. Phillips, Jr., Randall A. Underwood, and Wayne A.
Logan, for plaintiff-appellant.*

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Clifton & Singer, L.L.P., by Richard G. Singer, for defendants-appellees W. Dean Huber and Ellen B. Huber.

Gulley, Kuhn & Taylor, L.L.P., by David J. Kuhn, for defendants-appellees Michael R. Ferraro and Sandra E. Ferraro.

LEWIS, Judge.

Plaintiff Franklin Credit Recovery Fund appeals superior court orders denying its foreclosure petition and motion to reopen for additional evidence. We reverse.

Plaintiff is the beneficiary of deeds of trust on properties owned by W. Dean Huber and his wife Ellen B. Huber, and Michael R. Ferraro and his wife Sandra E. Ferraro. The deeds secure a consolidation loan in the amount of \$195,976.11, which is evidenced by a promissory note dated 30 October 1990 ("promissory note"). The promissory note consolidates three pre-existing unsecured lines of credit executed by the partners of the partnership of Styles, Bloom, Huber, and Ferraro. The promissory note was executed by the partners and their wives due to an impending government take-over of First Federal Bank ("First Federal"), the original holder of the promissory note. Defendants were informed that due to the take over of First Federal they would either have to pay the three outstanding loans in full or refinance them. Defendants received no additional funds from the promissory note and the interest rate was slightly higher. Defendants failed to repay the promissory note on its due date. The Clerk of Wake County Superior Court entered an order dated 8 March 1996 authorizing the substitute trustee to proceed under the deeds of trust, and to give notice of and conduct foreclosure sales. Defendants appealed to the Superior Court of Wake County.

In superior court, defendants argued that the promissory note was not supported by valuable consideration because they did not receive any benefit in exchange for executing the note and that the pre-existing loans refinanced by the promissory note were not executed by the partnership. Further, defendants maintained that the spouses, Sandra Ferraro and Ellen Huber, signed only as accommodation makers; they received no benefit from signing the promissory note and owed nothing on previous debts of the partnership. The trial court, in an order dated 10 May 1996, reversed the decision of the clerk and denied plaintiff's petition to foreclose. By order entered 12

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July 1996, the court denied plaintiff's motion to reopen the hearing for the taking of additional evidence.

Plaintiff brings forth two assignments of error. Because we find merit in the first, we do not reach the second. Appellant contends that the trial court erred as a matter of law in denying its petition to foreclose. We agree.

N.C. Gen. Stat. section 25-3-303 provides in pertinent part:

(a) An instrument is issued or transferred for value if:

(1) The instrument is issued or transferred for a promise of performance, to the extent the promise has been performed;

(3) The instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due;

(b) "Consideration" means any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due, and the promise has not been performed. *If an instrument is issued for value as stated in subsection (a) of this section, the instrument is also issued for consideration.*

N.C. Gen. Stat. § 25-3-303 (1995) (emphasis added).

The promissory note is a "negotiable instrument" under N.C. Gen. Stat. Section 25-3-104(a). The promissory note, on its face, states: "an unconditional promise or order to pay a fixed amount of money with . . . interest or other charges described in the promise or order; that at the time it was issued it was payable 'to the order of' First Federal; and that it was payable at a definite time." See N.C. Gen. Stat. § 25-3-104(a) (1995). Thus, if the instrument were given for value, as provided for in G.S. § 25-3-303(a), it was also issued with consideration as a matter of law. G.S. § 25-3-303(b). We find that the promissory note was given for value and therefore consideration was present as a matter of law.

The underlying transactions here qualify under G.S. § 25-3-303(a)(1) and (3). First, the note was issued as a replacement for the old loans; it was issued in exchange for First Federal's promise

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to refinance and cancel the old loans. Second, the promissory note was issued as "payment of, or as security for" the antecedent debt of the old loans. Defendants argue that there is no antecedent debt for which they are jointly responsible; therefore, there was no consideration supporting their promise to pay the promissory note.

Defendants do not appear to grasp the full import of the Uniform Commercial Code. Since the note signed by defendants is a negotiable instrument, it is governed by the provisions of the Uniform Commercial Code. G.S. § 25-3-104(a); *International Minerals and Chemical Corporation v. Matthews*, 71 N.C. App. 209, 321 S.E.2d 545 (1984), *disc. rev. denied*, 313 N.C. 330, 327 S.E.2d 890 (1985). There is no requirement that the antecedent claim be against the same person giving the instrument in payment. G.S. § 25-3-303. The antecedent claim discharged by the instrument can be against "any person." *Id.* The Official Comment to G.S. § 25-3-303(a) specifically states: "Subsection (a)(3) applies to any claim against *any person*. . . . [T]he provision is intended to apply to an instrument given in payment of or as security for the debt of a third person, even though no concession is made in return." G.S. § 25-3-303(a)(3) Official Comment n.4 (emphasis added). This language is clear.

G.S. § 25-3-303(b) states that if an instrument is given for value it is also given for consideration. Here, we find that the promissory note was issued as payment of an antecedent claim (the old loans) and in exchange for the cancellation of such loans as set forth in G.S. § 25-3-303(a)(1) and (a)(3). Therefore, under those provisions, the promissory note was supported by consideration as a matter of law.

Accordingly, the order is reversed.

Judges WYNN and MARTIN, John concur.

LITTLE v. LITTLE

[127 N.C. App. 191 (1997)]

IN THE MATTER OF: ZHOMA WILINA LITTLE, MINOR CHILD V. TINA LITTLE,
RESPONDENT V. BUNCOMBE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER, AND GUARDIAN AD LITEM, PETITIONER

No. COA96-1394

(Filed 5 August 1997)

Parent and Child § 116 (NCI4th)— termination of parental rights—right to counsel—no waiver by inaction

In an action brought by the Department of Social Services to terminate the parental rights of respondent, an indigent, the trial court erred by denying respondent's request for a court appointed counsel at her hearing even though respondent failed to file an answer or any pleadings and she did not request an attorney prior to the hearing. Pursuant to N.C.G.S. § 7A-289.23, if a parent is present at the hearing, waiver can result only from an examination by the trial court and a finding of a knowing and voluntary waiver.

Appeal by respondent from judgment entered 16 August 1996 by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 5 June 1997.

Charlotte A. Wade for petitioner-appellee Buncombe County Department of Social Services.

Michael E. Casterline for respondent-appellant.

LEWIS, Judge.

The only issue in this appeal from an order terminating respondent's parental rights is whether the trial court erred in not providing court appointed counsel for respondent at the hearing.

Respondent is the natural mother of Zhoma Little, born 24 October 1994. The Buncombe County Department of Social Services ("DSS") took custody of the minor child on 9 November 1994. On 20 February 1996, DSS filed a petition to terminate respondent's parental rights to the minor child. The initial summons was returned unserved. A second summons was issued and served on 9 April 1996.

At the 19 July 1996 hearing, respondent requested court appointed counsel. The trial court found that since she had not filed an answer or any other pleading and had not previously asked for an attorney, she had waived the right to court appointed counsel "by her lack of action." Respondent appeals.

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On appeal, respondent makes three assignments of error. However, she does not argue the third in her brief and it is deemed abandoned. *See* N.C.R. App. P. 28(b)(5) (1997).

Respondent first argues that the trial court erred by not allowing her the opportunity to obtain counsel at her hearing as she requested. She argues that the trial court failed to properly follow the procedure set forth in N.C. Gen. Stat. sections 7A-289.23, 289.27 and 289.30. Since we conclude that the statutes do not provide for waiver by inaction, we agree.

We initially point out that our Court has already recognized that a “parent[’s] right to counsel in a proceeding to terminate parental rights is now guaranteed in all cases by statute” and that “[a] parent’s interest in the accuracy and justice of the decision to terminate his or her parental rights is a commanding one.” *In re Bishop*, 92 N.C. App. 662, 664, 375 S.E.2d 676, 678 (1989). With these thoughts in mind, we entertain the arguments presented by this appeal.

N.C. Gen. Stat. section 7A-289.23 states that “[t]he parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right.” N.C. Gen. Stat. § 7A-289.23 (1995). N.C. Gen. Stat. section 7A-289.27 requires a summons issued for the purpose of terminating parental rights to include: “Notice that if they are indigent, the parents are entitled to appointed counsel. The parents *may* contact the clerk immediately to request counsel.” N.C. Gen. Stat. § 7A-289.27(b)(3) (1995) (emphasis added). Finally, N.C. Gen. Stat. section 7A-289.30 states:

The court shall inquire whether the child’s parents are present at the hearing and, if so, whether they are represented by counsel. If the parents are not represented by counsel, the court shall inquire whether the parents desire counsel but are indigent. In the event that the parents desire counsel but are indigent as defined by G.S. 7A-450(a) and are unable to obtain counsel to represent them, the court *shall* appoint counsel to represent them. . . . In the event that the parents do not desire counsel and are present at the hearing, the court shall examine each parent and make findings of fact sufficient to show that the waivers were *knowing and voluntary*.

N.C. Gen. Stat. § 7A-289.30(a1) (1995) (emphasis added).

It is clear from reading the above statutes that the General Assembly did not intend to allow for waiver of court appointed counsel due to inaction prior to the hearing. G.S. 7A-289.30 makes it quite

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clear that if the parent is present at the hearing, which respondent undoubtedly was, and does not waive representation, counsel "shall" be appointed. It is irrelevant how a respondent gets to the hearing. This respondent was in jail and had made no effort to answer or contact anyone. Petitioner sent for her and had her brought into court for the hearing. If the party is present in court, waiver can only result from an examination by the trial court and a finding of knowing and voluntary waiver. This Court has previously held that the hearing must be held even in cases where a parent has failed to answer. *See In re Tyner*, 106 N.C. App. 480, 483, 417 S.E.2d 260, 261 (1992). Furthermore, the summons issued to respondent in this case clearly states: "Parents are entitled to have counsel appointed by the court if they cannot afford one, provided that they request such counsel at or before the time of hearing on this matter." (Emphasis added).

In the present case, there was no examination as described in G.S. 7A-289.30. Respondent was present at the hearing, requested appointed counsel, but was denied. There is no support, statutory or otherwise, for the trial court's ruling that in North Carolina the right to counsel can be waived by inaction prior to the termination hearing. This ruling was error and is certainly prejudicial. We remand this matter to the trial court for a new hearing.

Due to our resolution of this matter, we do not address respondent's remaining assignment of error.

Reversed and remanded.

Judges WYNN and MARTIN, John C., concur.

THOMAS J. SEELY AND LAURA R. SEELY, PLAINTIFFS-APPELLEES v. BORUM & ASSOCIATES, INC. AND B.J. BARNES, SHERIFF OF GUILFORD COUNTY, DEFENDANTS-APPELLANTS

No. COA96-1299

(Filed 5 August 1997)

Liens § 29 (NCI4th)—erroneous judgment—collateral attack not permitted

The purchasers of a lot in a residential subdivision could not collaterally attack a judgment enforcing a contractor's prior mechanic's lien for engineering and surveying services provided

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to the subdivision developer on the ground that the judgment erroneously permitted the contractor to enforce its entire lien against their lot, since a judgment which is erroneous but not void may not be collaterally attacked, and the purchasers acquired title with actual and constructive (record) notice that it was subject to a lien superior to the interest they acquired and could have intervened in the lien suit.

Appeal by defendant Borum & Associates, Inc. from judgment entered 14 May 1996 by Judge Sanford L. Steelman, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 22 May 1997.

Stern, Graham, & Klepfer, L.L.P., by James W. Miles, Jr. and William A. Eagles, for plaintiffs-appellees.

Kenneth L. Jones for defendant-appellant Borum & Associates, Inc.

WYNN, Judge.

Defendant Borum & Associates, Inc. ("Borum") provided surveying and engineering services to Equestrian Properties Limited Partnership ("Equestrian") in connection with the development of the Polo Farms residential subdivision in Guilford County, North Carolina. When Equestrian failed to pay Borum for services rendered, Borum filed a Claim of Lien against the Polo Farms property under N.C. Gen. Stat. § 44A-12 and subsequently filed suit on 20 May 1992 to enforce its lien under N.C. Gen. Stat. § 44A-13. Named as defendants in the enforcement suit were Equestrian and all lienholders, mortgage holders and others with subordinate interests of record on the date the suit was filed.

Plaintiffs, Thomas J. and Laura R. Seely, purchased lot 251 in the Polo Farms subdivision in December 1992, after the enforcement suit was filed but before judgment was entered in that matter. Although plaintiffs had both record and actual notice of the lien and pending suit to execute the lien when they purchased lot 251, they did not intervene in the action. In August 1994, the trial court entered judgment awarding Borum \$27,650.39 and ruling that the lien was enforceable against the Polo Farms property as of 1 February 1990. Thereafter, the Clerk of Guilford County Superior Court issued execution directing the Sheriff to sell lot 251 to satisfy the lien in accordance with the judgment.

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Plaintiffs filed this action and the court subsequently issued a preliminary injunction enjoining the sale of lot 251 pending the outcome of the trial. At that trial, the court ruled that plaintiffs could collaterally attack the judgment Borum had obtained against Equestrian. After concluding that Borum had performed no work with respect to lot 251 (in section 1) after 5 February 1990 with the exception of the preparation of sales maps for sections 1, 2 and 3, the trial court ordered that a lien in the amount of \$581.65 be docketed against lot 251. All parties appealed to this Court.

We resolve this appeal by addressing only one of the several issues raised by the parties to this appeal: Did the trial court err by ruling that the Seelys could collaterally attack the judgment that Borum had obtained against Equestrian? Answer: Yes. The trial court erroneously concluded that the Borum judgment could be collaterally attacked by the Seelys.

In *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 239 S.E.2d 566 (1977), our Supreme Court noted:

The general rule is that a judgment may not be attacked by one who is a stranger to the action in which it was entered. However, this rule is not without exception. A judgment which is void, as opposed to being merely voidable or irregular, may be attacked at any time by anyone whose interests are adversely affected by it. For example, when a judgment operates as a lien upon real property, one who later acquires the property, even after entry of judgment, may move to vacate the judgment on the ground that it is void. One qualification to the above-stated exception is that the grounds which support an allegation that a judgment is void must appear upon the face of such judgment, or the plaintiff must allege facts which, if supported by competent evidence, would vitiate or nullify an otherwise apparently valid judgment.

Id. at 699, 239 S.E.2d at 572 (citations omitted).

In the subject case, the trial court allowed the Seelys to collaterally attack the Borum judgment because the Seelys "alleged facts in their complaint, which, if supported by competent evidence would vitiate or nullify an otherwise apparently valid judgment." In reaching this conclusion, the trial court relied upon the Seelys' allegations that the original judgment was void because it permitted Borum "to enforce the entire lien against one parcel out of all of the parcels subject to the lien" in contravention of N.C.G.S. § 44A-9. In essence, the

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trial court found that the Seelys had alleged facts sufficient to show that the Borum judgment was erroneous. However, the law is well-settled that an erroneous judgment, which is one "rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law, or upon an erroneous application of legal principles," may be remedied by appeal, but may not be collaterally attacked. *Wynne v. Conrad*, 220 N.C. 355, 360, 17 S.E.2d 514, 518 (1941). See also *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 360 S.E.2d 772 (1987); *East Carolina Lumber Co. v. West*, 247 N.C. 699, 102 S.E.2d 248 (1958); *Moore v. Humphrey*, 247 N.C. 423, 101 S.E.2d 460 (1958); *Worthington v. Wooten*, 242 N.C. 88, 86 S.E.2d 767 (1955); *Travelers Ins. Co. v. Rushing*, 36 N.C. App. 226, 243 S.E.2d 420 (1978). Therefore, we find that the trial court erred in permitting plaintiffs to collaterally attack Borum's judgment against Equestrian.

Moreover, we note that plaintiffs acquired title to the property with actual and constructive (record) notice that it was subject to a lien superior to the interest which they acquired. Therefore, they could have intervened in the lien suit pursuant to Rule 24 of the North Carolina Rules of Civil Procedure in order to protect their rights and interest in lot 251 and could have brought forward the same arguments and contentions that they espouse in this present action.

In light of our holding, we find it unnecessary to address other issues raised by the parties to this appeal.

For the foregoing reasons, the judgment of the trial court is,

Reversed.

Judges LEWIS and MARTIN, John C., concur.

TUCKER v. MEIS

[127 N.C. App. 197 (1997)]

YVETTE P. TUCKER AND LARRY TUCKER, PLAINTIFFS-APPELLANTS v. DR. PAUL J. MEIS, AND NORTH CAROLINA BAPTIST HOSPITALS, DEFENDANTS-APPELLEES

No. COA96-1293

(Filed 5 August 1997)

Evidence and Witnesses § 2250 (NCI4th)— medical malpractice—negligence—medical expert—standard of care—community

In a medical malpractice action, the trial court properly excluded the testimony of plaintiff's medical expert where the expert testified that he was familiar with the standard of care in North Carolina but failed to testify that he was familiar with the standard of care in the community in which the alleged negligence took place or in similar communities as required by N.C.G.S. § 90-21.12.

Appeal by plaintiffs from orders entered 16 May and 24 June 1996 by Judge H.W. Zimmerman, Jr. in Iredell County Superior Court. Heard in the Court of Appeals 22 May 1997.

Marsha C. Hughes Grayson for plaintiffs-appellants.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Tamara D. Coffey, for defendants-appellees.

WYNN, Judge.

Plaintiffs, Yvette P. Tucker and her husband, Larry Tucker, brought this medical malpractice action to recover for an allegedly negligently repaired episiotomy performed on Mrs. Tucker following child birth in Winston-Salem, North Carolina.

At trial, plaintiffs presented two expert witnesses: An OB-GYN specialist licensed in Virginia and Tennessee who had been practicing in Tennessee and Mrs. Tucker's treating psychologist. After finding that plaintiffs failed to present competent medical testimony establishing the standard of care or defendants' breach thereof, the trial court granted directed verdict in defendants' favor. Plaintiffs appeal.

Although plaintiffs raise several issues on appeal, only one need be addressed by us: Whether the trial court erred by excluding the testimony of their medical expert as to the standard of care. We

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answer: No, and therefore affirm the trial court's order granting directed verdict to defendants.

Plaintiffs contend that although their medical expert, Dr. Tasker, testified that he was familiar with the standard of care in North Carolina, the trial court improperly sustained objections when counsel asked him to testify as to what that standard was and whether it was breached by defendants. They argue that since the trial court based its directed verdict on plaintiffs' failure to establish the standard of care and defendants' breach, this error was prejudicial and warrants a new trial. We disagree.

N.C. Gen. Stat. § 90-21.12 prescribes the relevant standard of care in a medical malpractice action—"the standards of practice among members of the same health care profession with similar training and experience situated *in the same or similar communities* at the time of the alleged act giving rise to the cause of action." (emphasis added). In *Page v. Wilson Memorial Hospital*, 49 N.C. App. 533, 535, 272 S.E.2d 8, 10 (1980), we said: "By adopting the 'similar community' rule in G.S. 90-21.12 it was the intent of the General Assembly to avoid the adoption of a national or regional standard of care for health providers. . . ."

After reviewing Dr. Tasker's testimony in its entirety, we find that the record indicates he failed to testify in any instance that he was familiar with the standard of care in Winston-Salem or similar communities. Although Dr. Tasker testified that he was familiar with the standard of care in North Carolina, he failed to make the statutorily required connection to the community in which the alleged malpractice took place or to a similarly situated community. Notably, we agree with plaintiffs that the phrasing of the questions used to elicit the standard of care need not follow § 90-21.12 verbatim; to so require would improperly place form over substance. However, the questions asked must elicit the relevant standard of care as set out in that statute. Moreover, while we recognize that "changes in the rural-urban population pattern of the country and changes in medical education, training, and communication have led to greater standardization of medical practices," *Wiggins v. Piver*, 276 N.C. 134, 140, 171 S.E.2d 393, 397 (1970), N.C.G.S. § 90-21.12 mandates that the relevant standard of care is that of the community where the injury occurred (or similar communities) and not that of the state as a whole. See *Dailey v. North Carolina State Bd. of Dental Exmrs.*, 60 N.C. App. 441, 299 S.E.2d 473, *rev'd on other grounds*, 309 N.C. 710, 721, 309

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S.E.2d 219, 225 (1983) (noting that “[i]t is clear from the wording of this statute that the test is not that of a statewide standard of health care.”). This community standard allows for consideration of the effect that variations in facilities, equipment, funding, etc., throughout the state might have on the standard of care.

In sum, the problem with Dr. Tasker’s testimony was not that he had not practiced in North Carolina; rather, it was his failure to testify that he was familiar with the standard of care in Winston-Salem or similar communities. Without such testimony, Dr. Tasker’s opinion as to a standard of care for the State of North Carolina and whether defendants met that standard was irrelevant. The plain language of N.C.G.S. § 90-21.12 requires this result; therefore, we must hold that the trial court correctly sustained defendants’ objections to Dr. Tasker’s testimony.

Our holding makes it unnecessary to address plaintiffs’ remaining issues. Accordingly, we affirm the trial court’s order granting directed verdict for defendants.

Affirmed.

Judges LEWIS and MARTIN, John C., concur.

NELLIE A. BIGGERS, PLAINTIFF V. JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, JOHN HANCOCK PROPERTIES, INC., AND CITY OF CHARLOTTE
(A MUNICIPAL CORPORATION), DEFENDANTS

No. COA96-1260

(Filed 5 August 1997)

1. Appeal and Error § 122 (NCI4th)— flooding—multiple defendants—summary judgment against one—appealable

A summary judgment in favor of one of several defendants in an action arising from the flooding of plaintiff’s property was appealable where the plaintiff had alleged that the flooding was the direct and proximate result of the joint acts of negligence of all the defendants. Plaintiff had a substantial right to have the liability of all defendants determined in the same trial in order to avoid the possibility of inconsistent verdicts. N.C.G.S. § 1-277, 7A-27(d).

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[127 N.C. App. 199 (1997)]

2. Municipal Corporations § 421 (NCI4th)— negligent clearing of stormwater drains—governmental immunity—private water drains

The trial court did not err in granting summary judgment in favor of defendant-city based on the doctrine of governmental immunity where plaintiff alleged that the City negligently unclogged private storm water drains. While cities and towns have been held liable for negligent storm drain maintenance, *Pulliam v. City of Greensboro*, 103 N.C. App. 748, implies that it must first be determined whether the city either owned or operated the drainage system.

Appeal by plaintiff from judgment entered 22 July 1996 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 1 May 1997.

Bailey, Patterson, Caddell, Hart & Bailey, P.A., by David C. Cordes, for plaintiff-appellant.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by Rex C. Morgan, and R. Cartwright Carmichael, for defendant City of Charlotte.

WYNN, Judge.

Plaintiff Nellie Biggers sued defendants John Hancock Mutual Life Insurance Company and John Hancock Properties, Inc. (hereinafter "John Hancock") and defendant City of Charlotte for flood damages to her home caused by the sudden overflowing of the creek behind her property on 16 June 1992. She alleged that John Hancock negligently permitted debris to clog storm water drains located throughout the parking area of its apartment complex, causing substantial amounts of water to back up and flood the parking area. As to the City of Charlotte, she alleged that in response to a request by John Hancock to provide assistance in unclogging the storm waters drains, the City's fire department negligently released the water into the already over-burdened creek causing it to flood her neighborhood which was downstream from the apartment complex.

Following a pretrial hearing, the trial court granted summary judgment in favor of the City of Charlotte. Ms. Biggers appealed to this Court.

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[127 N.C. App. 199 (1997)]

[1] As a preliminary matter, we note that the entry of summary judgment for fewer than all the defendants is not a final judgment and may not be appealed in the absence of certification pursuant to Rule 54(b) unless the entry of summary judgment affects a substantial right. N.C. Gen. Stat. § 1-277, 7A-27(d). Since Ms. Biggers' alleges that the flooding of her property was the direct and proximate result of the joint acts of negligence of all the defendants, we find that she has a substantial right to have the liability of John Hancock and the City of Charlotte determined in the same trial in order to avoid the possibility of inconsistent verdicts. *See Baker v. Rushing*, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

[2] The determinative issue on appeal is whether the City of Charlotte is immune from Ms. Biggers' claim of negligence. Under the doctrine of governmental immunity,

[A] municipality is not liable for the torts of its officers and employees if the torts are committed while they are performing a governmental function. *Herndon v. Barrett*, 101 N.C. App. 636, 640, 400 S.E.2d 767, 769 (1991); *Wiggins v. City of Monroe*, 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985), which includes the organization and operation of a fire department. *Great American Ins. Co. v. Johnson*, 257 N.C. 367, 370, 126 S.E.2d 92, 94 (1962).

Taylor v. Ashburn, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993), cert. denied, 336 N.C. 77, 445 S.E.2d 46 (1994).

Ms. Biggers maintains that the City of Charlotte does not enjoy governmental immunity because the maintenance of storm drains is a proprietary function and as a result, the courts have held cities and towns liable for negligent storm drain maintenance. *See generally Kizer v. City of Raleigh*, 121 N.C. App. 526, 466 S.E.2d 336 (1996) (Governmental immunity prevents municipal corporations from being sued when they act in a governmental capacity, but does not apply to actions which are proprietary.).

In *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 407 S.E.2d 567 (1991), Judge Wells analyzed the basis for determining whether a municipal function is proprietary and subject to tort liability versus functions which are governmental, in which case the municipality would enjoy immunity from negligent liability. In *Pulliam*, we concluded that the municipality was "not immune from tort liability in the operation of its sewer system." *Id.* at 754. (emphasis supplied).

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Thus, prior to considering whether the City of Charlotte's acts in unclogging the subject drainage system constituted a proprietary or governmental function, *Pulliam* implies that it must first be determined whether the city either owned or operated the drainage system. *See also Milner Hotels, Inc. v. City of Raleigh*, 268 N.C. 535, 151 S.E.2d 35 (1966), *modified on reh'g*, 271 N.C. 224, 155 S.E.2d 543 (1967) (a municipality is responsible for negligent maintenance of drains constructed by third persons only if it adopted them as part of its drainage system or assumed control and management thereof).

In the instant case, Ms. Biggers does not allege that the City of Charlotte negligently failed to maintain *its* own drainage system; rather, she asserts that it negligently unclogged *private* storm water drains in response to John Hancock's request for assistance. We find this distinction determinative and therefore hold that the City of Charlotte's actions in unclogging a privately owned storm drain were not proprietary. The trial court properly found that Ms. Biggers' action against the City of Charlotte was barred by the doctrine of sovereign immunity. Accordingly, the order granting summary judgment for the City of Charlotte is,

Affirmed.

Judges GREENE and TIMMONS-GOODSON concur.

LACY McFADYEN, WILLIE HORSLEY, WAYNE CLAY, DONALD WHITAKER, WILLIAM R. MOORE, CHARLES WARD, LEROY DOUGLAS, LUTHER THOMAS AND JOHN M. MCKOY, PLAINTIFFS v. FRANKLIN FREEMAN, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF NORTH CAROLINA DEPARTMENT OF CORRECTION, AND THE NORTH CAROLINA DEPARTMENT OF CORRECTION, DEFENDANTS

No. COA96-1129

(Filed 5 August 1997)

State § 27 (NCI4th)— claim against DOC—breach of contract—exception to sovereign immunity

The amended complaint of school principals and assistant principals of the Department of Correction alleging that the Department violated provisions of their written employment contracts providing that they were to be compensated at sums complying with the State Salary Schedule and that their salaries are

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[127 N.C. App. 202 (1997)]

governed by N.C.G.S. § 115C-285 stated a claim for breach of contract which falls within the contract exception to the doctrine of sovereign immunity.

Defendants appeal from order entered 26 June 1996 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 13 May 1997.

Ferguson, Stein, Wallas, Adkins, Gresham & Sumter, P.A., by Thomas M. Stern and James E. Ferguson, III, for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Valerie L. Bateman, for the State.

TIMMONS-GOODSON, Judge.

Defendant Franklin Freeman, in his official capacity as Secretary of the North Carolina Department of Correction, and defendant North Carolina Department of Correction ("DOC") appeal from an order denying their motion to dismiss plaintiffs' complaint pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure and allowing plaintiffs' motion for leave to amend their complaint. For the reasons stated herein, we affirm the order of the trial court.

Plaintiffs, who served as principals and assistant principals of DOC, filed suit alleging that North Carolina General Statutes sections 115C-285(a)(7), 126-5(c3) and 115C-32 require that plaintiffs, like their counterparts in public schools, be compensated in accordance with the State of North Carolina Salary Schedule. Plaintiffs' complaint further alleged that defendants violated these statutes and that they breached employment contracts with plaintiffs by paying them lower salaries than those to which they were entitled. Defendants filed a motion to dismiss plaintiffs' complaint pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. Plaintiffs filed a motion for leave to amend their complaint. The trial court denied defendants' motion to dismiss and allowed plaintiffs' motion to amend their complaint. Defendants appeal.

Defendants first argue that the trial court erred when it denied their motion to dismiss plaintiffs' complaint and granted plaintiffs leave to file an amended complaint. Defendants contend that the defense of sovereign immunity shields them from suit, because both

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the original and amended complaints fail to allege facts sufficient to state a valid claim for breach of contract under *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976).

At the outset, we note that denial of a motion to dismiss is interlocutory; however, issues involving sovereign immunity are immediately appealable. *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 424 S.E.2d 420, *disc. review denied*, 334 N.C. 162, 432 S.E.2d 358 (1993). Thus, the trial court's denial of defendants' motion to dismiss is properly before this Court.

Plaintiffs' amended complaint alleges as follows: "DOC's employment contract for probationary principals provides that they are to be paid 'the sum to which [they are] entitled according to the applicable State Salary Schedule.' " Plaintiffs contend that this allegation, taken together with the other allegations in the amended complaint, sets out a contract violation claim falling squarely within the contract exception to sovereign immunity recognized in *Smith*, 289 N.C. 303, 222 S.E.2d 412.

In *Smith*, our Supreme Court articulated a contract exception to the doctrine of sovereign immunity. The Court declared:

We hold . . . that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract. Thus, in this case, and in causes of action on [sic] contract arising after the filing date of this opinion, . . . the doctrine of sovereign immunity will not be a defense to the State.

Id. at 320, 222 S.E.2d at 423-24. Thus, our inquiry on appeal is whether plaintiffs' amended complaint sets forth a sufficient breach of contract claim. As previously noted, the amended complaint alleged that plaintiffs had written employment contracts with the DOC which provided that they were to be compensated at sums complying with the State Salary Schedule. Further, plaintiffs alleged that their salaries were governed by section 115C-285, which provides that:

[a]ll persons employed as principals in the schools and institutions listed in subsection (p) of G.S. 115C-325 [which includes DOC] shall be compensated at the same rate as are teachers in the public schools in accordance with the salary schedule adopted by the State Board of Education.

N.C. Gen. Stat. § 115C-285(a)(7) (Cum. Supp. 1996).

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Accordingly, plaintiffs' amended complaint is sufficient in that "it gives notice of the events and transactions and allows the adverse party to understand the nature of the claim and to prepare for trial." *Smith v. N. C. Farm Bureau Mutual Ins. Co.*, 84 N.C. App. 120, 123, 351 S.E.2d 774, 776 (citing *Henry v. Dean*, 310 N.C. 75, 310 S.E.2d 326 (1984)), *aff'd*, 321 N.C. 60, 361 S.E.2d 571 (1987). Moreover, the amended complaint gives adequate notice to defendants that plaintiffs claim an invasion of their property rights. Therefore, the trial court did not err in denying defendants' motion to dismiss.

In light of the foregoing, the trial court's denial of defendants' motion to dismiss is affirmed.

Affirmed.

Judges COZORT and MARTIN, Mark D., concur.

Judge COZORT concurred prior to 31 July 1997.

PEARLY VEREEN, PLAINTIFF v. KELLY HOLDEN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS BRUNSWICK COUNTY COMMISSIONER; DONALD SHAW, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS BRUNSWICK COUNTY COMMISSIONER; JERRY JONES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS BRUNSWICK COUNTY COMMISSIONER; WAYLAND VEREEN, IN HIS OFFICIAL CAPACITY AS BRUNSWICK COUNTY COMMISSIONER; DON WARREN, IN HIS OFFICIAL CAPACITY AS BRUNSWICK COUNTY COMMISSIONER; TOM RABON, IN HIS OFFICIAL CAPACITY AS BRUNSWICK COUNTY COMMISSIONER; GENE PINKERTON, IN HIS OFFICIAL CAPACITY AS BRUNSWICK COUNTY COMMISSIONER; FRANKIE RABON, IN HIS OFFICIAL CAPACITY AS BRUNSWICK COUNTY COMMISSIONER; DAVID CLEGG, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS INTERIM MANAGER; AND BRUNSWICK COUNTY, DEFENDANTS

No. COA94-1150

(Filed 5 August 1997)

Labor and Employment § 69 (NCI4th)— ordinance—property interest—procedural due process—issue of fact—judgment on the pleadings

On remand from the Supreme Court in light of *Soles v. City of Raleigh Civil Service Comm.*, 345 N.C. 443, 480 S.E.2d 685 (1997), the prior Court of Appeals decision that the trial court erred in granting judgment on the pleadings for defendant on plaintiff's procedural due process employment claim is un-

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[127 N.C. App. 205 (1997)]

changed since, unlike *Soles*, there was a material issue of fact as to whether the policy in question was an ordinance and conferred a property interest in plaintiff's continued employment.

On remand from the Supreme Court in light of its decision in *Soles v. City of Raleigh Civil Service Comm.*, 345 N.C. 443, 480 S.E.2d 685 (1997).

Sheila K. McLamb and Laura E. Thompson for plaintiff-appellant.

Faison & Gillespie, by Reginald B. Gillespie, Jr., Michael R. Ortiz and Keith D. Burns, for defendants-appellees.

LEWIS, Judge.

The Supreme Court has remanded this matter to us for consideration of one issue: whether our decision that judgment on the pleadings was improper on plaintiff's procedural due process claim is correct in light of its decision in *Soles v. City of Raleigh Civil Service Comm.*, 345 N.C. 443, 480 S.E.2d 685 (1997). We do not set forth the facts of this case as they are reported in our earlier decision, *Vereen v. Holden*, 121 N.C. App. 779, 468 S.E.2d 471 (1996).

Initially, we recognize the standard in cases involving judgments on the pleadings: the movant must show that there is no material issue of fact and that he is entitled to judgment as a matter of law. *Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283, *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996). Therefore, if any issues of material fact remain despite the Supreme Court's decision in *Soles*, our initial decision must stand.

In *Soles*, the Supreme Court ruled that absent incorporation into an employment contract, a city's personnel policy does not bestow a property interest in continued employment unless it is passed by legislative adoption. *Soles*, 345 N.C. at 447, 480 S.E.2d at 687-88. In that case, since the policy was not a city ordinance passed into law, the petitioner had no constitutionally protected property interest. *Id.*

The present case is factually dissimilar. The policy at issue here was passed at a meeting of the Brunswick County Board of Commissioners and was designated an "ordinance." We find no merit in defendants' suggestion that we look beyond the legislative enactment and label "ordinance" to find that, in substance, the policy was not an ordinance. Clearly, the dispositive factor considered by the

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Soles Court was whether the personnel policy was adopted as law or something less by a legislative body. Here, the record clearly suggests enactment as an ordinance, therefore law. Nevertheless, the record does not state in detail whether or not the statutory procedures for the adoption of an ordinance were followed completely. *See* N.C. Gen. Stat. §§ 153A-45, 48 (1991). If plaintiff cannot show compliance with the statutes, the policy cannot be considered an ordinance.

At this stage in the proceedings, we hold that it is too early to rule as a matter of law that the personnel policy did not confer a property interest on plaintiff. Given that some issues of material fact remain, this portion of the case must be allowed to proceed.

For the foregoing reasons, we conclude that our initial decision is unchanged in light of *Soles*. We therefore reverse the trial court's grant of judgment on the pleadings on plaintiff's procedural due process claim.

Reversed.

Judges EAGLES and JOHN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 5 AUGUST 1997

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| AVANT v. SANDHILLS CENTER FOR MENTAL HEALTH No. 96-1081 | Richmond (96CVS451) | Reversed and Remanded |
| BRANTLEY v. REED No. 97-46 | Wilson (95CVS708) | No Error |
| BROWN v. ZIEMANN No. 96-1052 | Columbus (94CVS1219) | No Error |
| BYRD v. CHARLOTTE MECKLENBURG BD. OF EDUC. No. 96-884 | Mecklenburg (95CVS15457) | Affirmed in part and Reversed in part |
| CARROLL v. KOONTZ No. 96-743 | Forsyth (94CVS2457) | No Error |
| CARROLL v. KOONTZ No. 96-1019 | Forsyth (96CVS2213) | Affirm |
| CENTURA BANK v. HALE No. 96-1281 | Edgecombe (96CVS6) | Reversed |
| CONNOR v. ANDERSON No. 96-1341 | Orange (94CVS1031) | No Error |
| DARDEN v. SOULES No. 96-981 | Dare (95CVD626) | Affirmed in part, and Reversed in part |
| DOLLARHITE v. MIDLAND DELIVERY SERVICES No. 96-1360 | Ind. Comm. (335335) | Affirmed |
| HOGOBOOM v. LANDCRAFT PROPERTIES No. 96-1397 | Mecklenburg (95CVS4844) | Dismissed |
| IN RE GRIFFIN No. 96-621 | Martin (95SP31) | Affirmed |
| IN RE TATE No. 96-1434 | Dare (96J12) | Affirmed |
| JAR CORP. v. CUSTOM MOLDERS No. 96-1343 | Durham (95CVS04107) | Reversed and Remanded |

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| MORNINGSIDE APTS. v. BARRINGER No. 96-1442 | Wake (95CVS2187) | Affirmed |
| PEARSON v. C. P. BUCKNER STEEL ERECTION CO. No. 96-1204 | Ind. Comm. (232290) | Affirmed |
| PENSON v. ACCENT MOBILE HOMES No. 96-1182 | Mecklenburg (92CVS16384) | Affirmed |
| POE v. SMITH No. 96-1384 | Randolph (95CVS37) | Affirmed in part; vacated and Remanded in part |
| POSTELL v. S & N COMMUNICATIONS No. 96-1175 | Ind. Comm. (300405) | Affirmed in part and Remanded |
| ROCHA v. MEDINA No. 96-914 | Mecklenburg (95CVS6294) | Reversed |
| ROPER v. JACKSON No. 96-1331 | Mecklenburg (95CVS2003) | No Error |
| SALGADO v. JOYNER MANAGEMENT SERVICES No. 96-1154 | Wake (95CVS7682) | Affirmed |
| SHANKS v. LEE No. 96-950 | Brunswick (93CVD1041) | Defendant's appeal from 26 April 1996 Order— Dismissed. Defendant's appeal from 18 July 1996 Order— Dismissed. |
| SLATTON v. METRO AIR CONDITIONING No. 96-1072 | Ind. Comm. (968113) | Affirmed |
| SPARROW v. QUINN No. 96-1106 | Lenoir (94CVS210) | Affirmed |
| STATE v. BODIE No. 97-194 | Catawba (95CRS01705) | No Error |

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| STATE v. CASHWELL No. 96-1099 | Forsyth (95CRS26232) (95CRS44074) (95CRS44076) | No Error |
| STATE v. CAUDILLO No. 96-847 | Cumberland (94CRS56798) (94CRS56799) (94CRS56800) (94CRS56801) (94CRS56807) (94CRS56808) (94CRS56810) (94CRS56811) | No error in part, and judgments arrested in part |
| STATE v. CRANFORD No. 96-1186 | Guilford (95CRS32969) (95CRS22208) (95CRS56859) | No Error |
| STATE v. DAMRON No. 96-1437 | Rowan (95CRS9859) | No Error |
| STATE v. DICKENS No. 96-928 | Carteret (95CRS2129) | No Error |
| STATE v. ELLIOT No. 96-1401 | Union (95CRS10995) | Dismissed |
| STATE v. EVANS No. 96-1213 | Guilford (95CRS20612) (95CRS20613) | No Error |
| STATE v. GRIGG No. 96-1007 | Gaston (93CRS14710) | No Error |
| STATE v. HILL No. 97-5 | Wake (95CRS86986) (95CRS86988) | No Error |
| STATE v. HUNT No. 97-179 | Cumberland (95CRS54053) | No Error |
| STATE v. INMAN No. 96-922 | Swain (95CRS104) | New Trial |
| STATE v. JOHNSON No. 96-1017 | Orange (94CRS1067) | No Error |
| STATE v. TENCH No. 96-955 | Gaston (95CRS28730) | No Error |
| STATE v. WATLINGTON No. 97-99 | Guilford (95CRS79595) | No Error |

STATE v. WOODEN
No. 97-86

Beaufort
(95CRS7358)
(95CRS7359)
(95CRS7360)

No Error

WADDELL v. PENINGER
No. 96-1032

Rowan
(94CVD2148)

Affirmed

TATE TERRACE REALTY INVESTORS, INC. v. CURRITUCK COUNTY

[127 N.C. App. 212 (1997)]

TATE TERRACE REALTY INVESTORS, INC., PETITIONER v. CURRITUCK COUNTY
AND ITS BOARD OF COMMISSIONERS, RESPONDENTS

No. COA96-731

(Filed 19 August 1997)

1. Appeal and Error §§ 426, 422 (NCI4th)— type size restrictions—briefing of arguments not cross-assigned as error—imposition of double costs

Petitioner-appellee's violation of type size restrictions imposed on briefs submitted to the Court of Appeals and its discussion of issues not in respondent-appellant's brief without preserving those issues by cross-assignment of error resulted in the imposition of double costs pursuant to N.C.R.App. P. 25(b) and 34(b)(2)(a).

2. Zoning § 121 (NCI4th); Administrative Law and Procedure § 60 (NCI4th)— quasi-judicial boards—appellate review by superior court and Court of Appeals—nature of review

A legislative board such as a board of commissioners sits as a quasi-judicial body when it grants or denies a special use permit and its decisions are subject to review by the superior court by proceedings in the nature of certiorari, wherein the superior court sits as an appellate court. The principles of the North Carolina Administrative Procedures Act do not govern, but are "highly pertinent." The task of a court reviewing a decision made by a town board sitting as a quasi-judicial body includes reviewing the record for errors in law; insuring that procedures specified by law in statute and ordinance are followed; insuring that appropriate due process rights of a petitioner are protected; insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record; and insuring that decisions are not arbitrary and capricious. The quasi-judicial body's findings of fact are binding if supported by substantial competent evidence presented at the hearing and the reviewing court may not substitute its own judgment; however, information not revealed at a public hearing and therefore not subject to refutation is not competent evidence and cannot support a finding of the Board. The Court of Appeals appellate review of the superior court judgment, being derivative of the power of the superior court, has been described as determining whether the trial court exercised the appropriate scope of review and, if appropriate, whether the court did so properly.

TATE TERRACE REALTY INVESTORS, INC. v. CURRITUCK COUNTY

[127 N.C. App. 212 (1997)]

3. Zoning § 71 (NCI4th)— Board of Commissioners—special use permit—denial not arbitrary and capricious—substantial competent evidence to support finding

The trial court erred in reversing the Currituck County Board of Commissioner's denial of petitioner's application for a sketch/plan special use permit for a subdivision based on a determination that the decision of the Board was not supported by substantial evidence where the court's order indicates that it reviewed the whole record; the court having exercised the appropriate scope of review, the question becomes whether it did so properly; information was provided to the Board by the Currituck County Planning Director (Simoneau) at a hearing on 3 October 1994, including a summary of comments from the Currituck County Superintendent of Public Schools; that testimony and accompanying material indicated that a new subdivision of this size would have a dramatic adverse effect on the Currituck County School system; the matter was scheduled for an additional public hearing on 5 December 1994; petitioner requested a continuation of the application on that date; and a public hearing was held on 5 December, during which a letter was submitted from the school superintendent concerning the long range needs of the system; the Board was informed of petitioner's request for a continuance and the request was granted; and the application was denied on 6 February based solely on provisions of the county development ordinance concerning proposed development which would exceed the County's ability to provide adequate facilities, including schools. Petitioner's contention that the information presented at the 5 December meeting was not properly before the Board and thus not part of the whole record was not sustained by the record because the hearing was conducted pursuant to public notice, petitioner did not participate, and the Board received certain information and thereafter continued further action pursuant to petitioner's request. Petitioner waived any right to object to the competency of the testimony by its failure to participate in the duly noticed public hearing. Furthermore, any error in receiving evidence at the 5 December hearing was harmless because the planning director again discussed the proposed subdivision at the 6 February meeting, a staff analysis was received which recommended that the permit be denied based upon inadequate public school facilities, and the findings which did not refer to the 5 December hearing were based upon competent evidence received at other meetings.

TATE TERRACE REALTY INVESTORS, INC. v. CURRITUCK COUNTY

[127 N.C. App. 212 (1997)]

4. Zoning § 71 (NCI4th)— denial of special use permit—subdivision exceeding school capacity—not arbitrary and capricious

The superior court erred by determining that the Currituck County Board of Commissioners acted arbitrarily and capriciously in denying an application for a special use permit for a new subdivision where there was substantial competent evidence in the record supporting the Board's findings, which sustained its conclusion that the proposed subdivision failed to meet the provisions of the county development ordinance because it exceeded the county's ability to provide adequate public school facilities. Although the trial court ruled that the Board's action was erroneous as a matter of law, the court identified no statute or principle of law allegedly violated.

5. Appeal and Error § 446 (NCI4th)— denial of special use permit for new subdivision—issues not raised before Board—not raised as cross-assignments of error—not considered

In an appeal from a superior court order reversing the Currituck County Board of Commissioners' denial of petitioner's application for a special use permit for a new subdivision, petitioner-appellee waived contentions supporting the superior court order by not setting forth the issues in the record on appeal as cross-assignments of error. Moreover, the record contains no indication that petitioner raised any of these contentions before the Board prior to the denial of its application, nor, with one exception, were petitioner's alternative arguments raised in the petition, and the exception was not addressed in the court's order. The superior court, sitting as an appellate court, may not consider a matter not addressed by the Board, and the Court of Appeals in its derivative appellate jurisdiction may not consider matters not raised below.

Appeal by Respondents from judgment entered 26 December 1995 by Judge William C. Griffin, Jr. in Currituck County Superior Court. Heard in the Court of Appeals 25 February 1997.

TATE TERRACE REALTY INVESTORS, INC. v. CURRITUCK COUNTY

[127 N.C. App. 212 (1997)]

Hornthal, Riley, Ellis & Maland, L.L.P., by M.H. Hood Ellis and John D. Leidy, and Michael B. Brough & Associates by Michael B. Brough for petitioner-appellee.

Currituck County Attorney William H. Romm, Jr., and Poyner & Spruill, L.L.P., by H. Glenn Dunn and Timothy P. Sullivan for respondent-appellant.

JOHN, Judge.

Respondents appeal judgment entered upon Writ of Certiorari issued 26 December 1995 by the trial court. Respondents contend the court erred by (1) determining the denial by the Currituck County Board of Commissioners (the Board) of petitioner's application for a sketch plan/special use permit (permit) was not supported by competent, material and substantial evidence, was erroneous as a matter of law, and was arbitrary and capricious, (2) ordering the Board to issue the permit, and (3) taxing costs to respondents. We reverse the trial court.

Relevant facts and procedural history are as follows: Petitioner Tate Terrace purchased a 519.7 acre tract in northern Currituck County (the property) at public auction on 22 April 1994. The sale was confirmed 29 April 1994 by the U.S. Bankruptcy Court for the Eastern District of North Carolina and petitioner received a deed to the property 10 June 1994.

Petitioner's predecessor in title, Moyock Investment Group, had obtained sketch plan approval from the Board 17 October 1988 to construct a 429 lot residential subdivision designated "Country Side" on the property along with an eighteen-hole golf course. Respondents concede petitioner purchased the property with a vested right to develop it in accordance with this sketch plan as approved.

Petitioner's representatives met with Currituck County planning staff to discuss development of the property as an 800 lot planned residential development without a golf course. Petitioner learned such modifications to the approved sketch plan would require the property to be rezoned from agriculture ("A") to basic residential ("R") or mixed residential ("RA"), followed by approval of a special use permit/sketch plan allowing a planned residential development (PRD). Petitioner submitted an application 19 July 1994 seeking to rezone the property from "A" to "R," but subsequently requested in a letter dated 8 August 1994 that action by the Board thereon be delayed until September.

TATE TERRACE REALTY INVESTORS, INC. v. CURRITUCK COUNTY

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On 2 September 1994, in lieu of its rezoning request, petitioner applied for a special use permit and sketch plan approval of a 601 lot subdivision called "The Plantations." The new subdivision was not a PRD and consequently rezoning was not required by the Currituck County Unified Development Ordinance (UDO). Nonetheless, because the development qualified as a "major subdivision" under the UDO and the property was zoned "A," it was necessary for the Board to issue a special use permit and approve the sketch plan.

In August 1994, the Planning Board suggested amending UDO § 1402(2) in response to substantial growth in the County. It was recommended that the Board be allowed to deny a special use permit if a proposed development more probably than not would "exceed the county's ability to provide adequate facilities, including, but not limited to, schools, fire and rescue, law enforcement, and other county facilities." A public hearing concerning the amendment was conducted 3 October 1994, and the proposal was adopted at the Board's 17 October 1994 meeting and codified as UDO § 1402(2)(e).

While the amendment was under consideration, the special use/sketch plan approval application of petitioners for The Plantations was also being reviewed. It likewise was accorded a public hearing 3 October 1994, and was scheduled for consideration by the Board at its 17 October 1994 meeting. However, petitioner requested the matter be continued until the next scheduled meeting, 7 November 1994, and thereafter received additional delays. A further public hearing was conducted 5 December 1994. Finally, on 6 February 1995, the Board unanimously denied petitioner's application based solely upon the provisions of § 1402(2)(e), concluding that the proposed development exceeded "the county's ability to provide adequate public school facilities."

On 20 March 1995, petitioner filed a Petition for Writ of Certiorari pursuant to N.C.G.S. § 153A-340 (1991) in Currituck County Superior Court, seeking review of the 6 February decision. A writ was issued 21 March 1995. Following respondents' 2 May 1995 answer, petitioner filed an Amended Petition for Writ of Certiorari (Petition) on 18 August 1995.

The matter came on for hearing 16 October 1995, and in an order filed 26 December 1995, the trial court reversed the decision of the Board and ordered respondents to issue the sketch plan/special use permit for "The Plantations." Respondents filed timely notice of appeal.

TATE TERRACE REALTY INVESTORS, INC. v. CURRITUCK COUNTY

[127 N.C. App. 212 (1997)]

I.

[1] We note as a threshold matter that petitioner has submitted a brief utilizing fourteen characters per inch type size as opposed to the ten characters per inch mandated by N.C.R. App. P. 26(g). Petitioner's appellate brief as submitted is of the maximum length allowed under N.C.R. App. P. 28(j). Use of the diminutive type thus in effect permitted petitioner to increase the length of its presentation to forty percent more than allowed by our rules. We have previously indicated that violation of the type size restriction would result in the imposition of sanctions pursuant to N.C.R. App. P. 25(b) and 34(b). *See Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 147, 468 S.E.2d 269, 273 (1996).

In addition, a considerable portion of petitioner-appellee's brief is devoted to issues not addressed in respondent-appellant's brief and not preserved by cross assignment of error. *See* N.C.R. App. P. 28(c) (additional questions raised by appellee's brief limited to those presented by cross assignment of error). Petitioner's improper submission of these new arguments moved respondent to submit a reply brief that presumably would not otherwise have been forthcoming. *See* N.C.R. App. P. 28(h)(1).

Because we reverse the order of the superior court, petitioner is required to bear the costs of this appeal. However, in view of the violations of our appellate rules noted above, we exercise our powers pursuant to N.C.R. App. P. 25(b) and 34(b)(2)(a) and impose double costs, the additional amount to be paid by counsel for petitioner. *See Roberts v. First Citizens Bank and Trust Co.*, 124 N.C. App. 713, 715-16, 478 S.E.2d 809, 811 (1996), *supersedeas granted*, 345 N.C. 346, 483 S.E.2d 176 (1997).

II.

[2] When a legislative body such as the Board grants or denies a special use permit, it is sitting as a quasi-judicial body. *See Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). Such decisions "shall be subject to review by the superior court by proceedings in the nature of certiorari," G.S. § 153A-340, wherein the superior court sits as an appellate court, and not as a trier of facts. *Capricorn Equity Corp. v. Town of Chapel Hill*, 334 N.C. 132, 135-36, 431 S.E.2d 183, 186 (1993).

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Although the superior court's review of the decision of a local board functioning as a quasi-judicial body is not governed by the North Carolina Administrative Procedures Act (the APA), N.C.G.S. § 150B-1 *et seq.* (1995), the principles of the APA are "highly pertinent" to the process of judicial review. *See Concrete Co.*, 299 N.C. at 625, 265 S.E.2d at 382. As such, "the task of a court reviewing a decision . . . made by a town board sitting as a quasi-judicial body," *id.* at 626, 265 S.E.2d at 382, includes:

- (1) Reviewing the record for errors in law,
- (2) Insuring that procedures specified by law in both statute and ordinance are followed,
- (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
- (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
- (5) Insuring that decisions are not arbitrary and capricious.

Charlotte Yacht Club v. County of Mecklenburg, 64 N.C. App. 477, 479, 307 S.E.2d 595, 597 (1983) (quoting *Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383). However, the scope of review is limited to errors alleged to have occurred before the local board. *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 63, 344 S.E.2d 272, 279 (1986).

When it is alleged that the action of a quasi-judicial body was not supported by substantial evidence or was arbitrary and capricious, the reviewing court must apply the "whole record" test. *Ballas v. Town of Weaverville*, 121 N.C. App. 346, 349, 465 S.E.2d 324, 326 (1996). Further, the body's findings of fact are binding if supported by substantial competent evidence presented at the hearing. *Capricorn*, 334 N.C. at 135-36, 341 S.E.2d at 186. The reviewing court may not substitute its own judgment for that of the body when the record contains competent and substantial evidence supporting the findings indicated by the quasi-judicial body, even though conflicting evidence in the record would have allowed the court to reach a contrary finding if proceeding *de novo*. *CG&T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 40, 411 S.E.2d 655, 660 (1992). Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. *Id.*

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As our Supreme Court has explained,

a zoning board of adjustment, or a board of aldermen conducting a quasi-judicial hearing, can dispense with no essential element of a fair trial: (1) The party whose rights are being determined must be given the opportunity to offer evidence, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal; (2) absent stipulations or waiver such a board may not base findings as to the existence or nonexistence of crucial facts upon unsworn statements; and (3) crucial findings of fact which are unsupported by competent, material and substantial evidence in view of the entire record as submitted cannot stand.

Refining Co. v. Board of Aldermen, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974) (citations omitted). Information not revealed at a public hearing and therefore not subject to refutation is not competent evidence, and cannot support a finding of the Board. *Ballas*, 121 N.C. App. at 350, 465 S.E.2d at 327.

This Court's appellate review of a superior court judgment on a writ of certiorari considering the action of a quasi-judicial body, being derivative of the power of the superior court to review the action, *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 649, 334 S.E.2d 103, 105 (1985), is likewise governed by analogy to the APA. This Court must examine "the trial court's order for error of law" just as with any other civil case. *See Act-Up Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (quoting *Amanini v. N.C. Dep't of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118-19 (1994)). "The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* (quoting *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118-19).

III.

[3] The trial court's order provided that the Board's denial of petitioner's application "was not supported by competent, material and substantial evidence, was erroneous as a matter of law, and was arbitrary and capricious." Guided by the rules stated above, we first address respondents' contention the trial court erred in determining the decision of the Board was not supported by substantial evidence.

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The court's order indicates it reviewed the whole record in considering this question. The court having exercised the appropriate scope of review, *see Ballas*, 121 N.C. App. at 349, 465 S.E.2d at 326, we proceed to decide whether it "did so properly." *Act-Up Triangle*, 345 N.C. at 706, 483 S.E.2d at 392.

The "whole record" indicates two public hearings were conducted on petitioner's application in addition to information presented to the Board at its 5 February 1995 meeting when final action was taken.

First, at the 3 October 1994 hearing, Jack Simoneau (Simoneau), Currituck County Planning Director, summarized under oath portions of written comments received from Ronnie Capps (Capps), Currituck County Superintendent of Public Schools. The written text of Capps' observations, as well as other information referred to by Simoneau at the hearing, were provided to the Board.

Simoneau's testimony and the accompanying material indicated that a new subdivision the size of The Plantations would have a dramatic adverse effect on the Currituck County School System (the System). On the same occasion, Alan Resh (Resh), a representative of petitioner, estimated that The Plantations would generate 312 additional students upon completion. Resh acknowledged that the figure, which represented a 10% increase over the August 1994 enrollment, was based upon an overall county average of "students per unit" and thus factored in numerous vacation homes on the Outer Banks.

Next, the matter was scheduled for an additional public hearing and for action on 5 December 1994. On that date, in a letter to Simoneau, petitioner requested "continuation of the sketch plan/special use permit application" until the Board's 19 December 1994 meeting so that petitioner might engage in a "work session" with the newly elected Board to discuss the proposal prior to final action. However, the public hearing was conducted, during which Simoneau submitted a letter from Capps concerning the long range needs of the System. Minutes of the hearing reflect that Simoneau informed the Board regarding the letter he had received that day from petitioner requesting a "continuation." The Board then voted to continue any action on the application until a later date.

Interestingly, petitioner maintains that information presented at the 5 December public hearing was improperly considered by the Board in that petitioner was told in advance the hearing would be continued and thus had no representative in attendance. However,

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save for petitioner's bald assertion in its appellate brief, the record contains no evidence that the Board, or any individual authorized to act on its behalf, canceled the public hearing or gave any assurance to petitioner that such would be the case. Indeed, petitioner has cited no authority suggesting the Board might properly cancel a duly advertised public hearing based upon the *ex parte* request of petitioner.

Moreover, petitioner in its brief acknowledges "Tate's engineer went to the meeting," *see Fowler v. Williamson*, 39 N.C. App. 715, 717, 251 S.E.2d 889, 890 (1979) ("[s]tatements of fact made in briefs, and legitimate inferences therefrom, may be assumed as true as against the party asserting them"), but insists the engineer was in attendance for "other clients" and not for "this hearing." While petitioner further accurately asserts "nothing in the record" indicates the engineer was "given any opportunity to participate," likewise nothing in the record reflects any attempt at intervention in the hearing by the engineer or any objection from him as to the Board's conducting the public hearing and receiving information on petitioner's application. In addition, the advance legal notices advertising the hearing indicated the purpose thereof was to conduct a public hearing regarding petitioner's application.

In short, based upon the record, the hearing was conducted on 5 December 1994 pursuant to public notice, petitioner did not participate, and the Board received certain information and thereafter continued further action on petitioner's application pursuant to the latter's request. The record fails to sustain petitioner's contention that information presented at the 5 December 1994 public hearing was not properly before the Board and thus not a portion of the "whole record" to which a reviewing court might look in determining whether substantial evidence supported the Board's decision.

Petitioner also argues Capp's 5 December letter was incompetent evidence because it was not obtained under oath and because petitioner had no opportunity to cross examine Capps. Petitioner cites UDO § 22 as incorporating these requirements, but the text of this ordinance is not included in the record. *See* N.C.R. App. P. 9(a) (appellate review "is solely upon the record on appeal"). Nonetheless, our Supreme Court has included cross-examination of adverse witnesses as one of the "essential element[s] of a fair trial" accorded "[t]he party whose rights are being determined" at a quasi-judicial hearing. *Refining Co.*, 284 N.C. at 470, 202 S.E.2d at 137. However, petitioner, by its failure to participate in the duly noticed

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public hearing, waived any right to object to the competency of the testimony. *See Craver v. Board of Adjustment*, 267 N.C. 40, 42, 147 S.E.2d 599, 601 (1966) (permit applicant who voluntarily participated without objection in hearing in which testimony was presented without witnesses being under oath and who likewise presented unsworn testimony waives right later to complain of denial of right of cross-examination).

Further, assuming *arguendo* receipt by the Board of evidence at the 5 December 1994 hearing was improper, any such error was harmless. Notwithstanding a particular finding of fact being unsupported by material and competent evidence, the action of a quasi-judicial body will be sustained if supported by remaining findings of fact upheld by substantial evidence, the erroneous finding being treated as mere surplusage. *See Torain v. Fordham Drug Co.*, 79 N.C. App. 572, 576, 340 S.E.2d 111, 114, (1986) (“[w]here, after erroneous factual findings have been excluded, there remain sufficient findings of fact based on competent evidence to support the [Industrial] Commission’s conclusions, its ruling will not be disturbed”). Our review of the Board’s findings not referencing the 5 December 1994 hearing indicates that each was based upon competent evidence received at either the 3 October 1994 public hearing or the Board’s 6 February 1995 meeting.

Finally, at the Board’s 6 February 1995 meeting, the record reflects Simoneau again discussed the proposed subdivision. In addition, the Board received a Currituck County Planning Department staff analysis of petitioner’s application recommending that the permit be denied based upon inadequate public school facilities.

In sum, notwithstanding petitioner’s challenge to information presented at the 5 December 1994 hearing, our review of the “whole record” reveals substantial evidence supporting the Board’s findings of fact. These findings are thus binding on appeal, *Capricorn*, 334 N.C. at 135-36, 342 S.E.2d at 186, and sustain the Board’s decision to deny petitioner’s permit application. The trial court therefore erred in reversing the Board on grounds the denial was not supported by substantial evidence.

[4] Although again exercising the appropriate scope of review, *see Act-Up Triangle*, 345 N.C. at 706, 483 S.E.2d at 392, the trial court also erred in its determination the Board’s decision was arbitrary and capricious. Black’s Law Dictionary 105 (6th ed. 1990) defines “arbitrary and capricious” as

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[c]haracterization of a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or law or without determining principle.

An arbitrary decision therefore is one where there is no substantial relationship between the facts in the record and the conclusions reached by the quasi-judicial body. As detailed above, substantial competent evidence in the record supported the Board's findings which in turn sustained its conclusion that petitioner's proposed development "fail[ed] to meet the provision of Section 1402(2)(e) of the UDO because it exceeds the county's ability to provide adequate public school facilities." The decision of the Board was neither arbitrary nor capricious.

Lastly, respondents contend the trial court erred in ruling that the Board's denial of petitioner's application was erroneous as a matter of law. Again, we agree.

The trial court's order identified no statute or principle of law allegedly violated, but presumably characterized the Board's decision as erroneous as a matter of law based upon its further determinations that the denial of petitioner's application was arbitrary and capricious and was not supported by substantial evidence. As we have held the Board's decision was supported by substantial competent evidence in the record and was neither arbitrary nor capricious, it necessarily follows that the trial court erred in concluding the action of the Board was erroneous as a matter of law.

IV.

[5] As noted earlier, petitioner asserts certain contentions in defense of the trial court's order. Petitioner argues (1) it possessed a vested right to develop the property, (2) UDO § 1402(2)(e) could not be retroactively applied to petitioner's application, (3) the amended ordinance constituted a statutory moratorium on growth in the County which the Board had no authority to enact, (4) the obligation of the County to provide for educational facilities is mandatory, and (5) the County could not constitutionally deny a development plan on the basis of inadequate school facilities in the absence of plans to construct additional facilities to accommodate the County's growth. However, none of the foregoing is set forth in the record on appeal as a cross-assignment of error thereby constituting an alternative basis in law for supporting the trial court's order. *See* N.C.R. App. P.

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9(a)(1)(k), 10(d). Petitioner's failure to raise these questions by cross-assignment of error "waives our consideration on appeal." *Williams v. N.C. Dept. of Economic and Community Development*, 119 N.C. App. 535, 539, 458 S.E.2d 750, 753 (1995) (quoting *In the Matter of Appeal from Civil Penalty*, 92 N.C. App. 1, 5-6, 373 S.E.2d 572, 575 (1988), *rev'd on other grounds*, 324 N.C. 373, 379 S.E.2d 30 (1989)).

Notwithstanding, we further observe the record contains no indication petitioner raised any of these contentions before the Board prior to denial of its application, nor, save for the vested rights issue, were petitioner's alternative arguments raised in the Petition, the vested rights issue itself not being addressed in the court's order. The superior court in its "posture of an appellate court," *Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383, on review by writ of certiorari, may not consider a matter not addressed by the Board, *Godfrey*, 317 N.C. at 63, 344 S.E.2d at 279. Nor may this Court through our derivative appellate jurisdiction consider matters not raised below. *Sherrill*, 76 N.C. App. at 649, 334 S.E.2d at 105. *See also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (where theory argued on appeal not raised before the trial court, "the law does not permit parties to swap horses between courts in order to get a better mount" before appellate court), and *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (theory upon which case is tried in lower court "must control in construing the record and determining the validity of the exceptions").

V.

Having held the trial court erred in reversing the decision of the Board, we need not reach the further question of the court's authority to order petitioner's application to be granted as opposed to remanding the matter to the Board; however, we reverse the taxing of costs to respondents, *see* N.C.G.S. § 6-20 (1986), as having been imposed in consequence of the court's erroneous reversal of the Board.

Reversed.

Judges EAGLES and COZORT concur.

Judge COZORT concurred prior to 31 July 1997.

REGAN v. AMERIMARK BUILDING PRODUCTS

[127 N.C. App. 225 (1997)]

MARK REGAN, PLAINTIFF V. AMERIMARK BUILDING PRODUCTS, INC., CLEM FOX
AND MICHAEL WLOCK, DEFENDANTS

No. COA96-1358

(Filed 19 August 1997)

**1. Workers' Compensation § 62 (NCI4th)— paint coater—
absence of safety guard—OSHA violation—insufficient evi-
dence to support *Woodson* claim**

In an action which resulted from plaintiff employee's injury while he was cleaning a paint coater without a safety guard, the trial court properly granted summary judgment in favor of defendant employer where plaintiff failed to produce evidence that defendant knew that its action of requiring plaintiff to operate the coater without a guard was substantially certain to cause serious injury or death, an essential element of a *Woodson* claim. The evidence indicated that the employer was aware that the coater was unguarded; the unguarded coater was in violation of OSHA regulations; defendant was cited with an OSHA violation for not having a guard on the coater; the plaintiff was required to manually clean the unguarded coater; defendant was working to satisfy the OSHA requirements; and OSHA had given defendant permission to continue operation and remedy the area where plaintiff was injured beyond the date of the injury. Moreover, there was no evidence that there were previous injuries while operating the paint coating machine in the same manner as plaintiff and there was no evidence that the cut-off switches were not working properly.

**2. Workers' Compensation § 69 (NCI4th)— injuries at work—
action against supervisors—conduct was not willful, wan-
ton or reckless**

The trial court correctly granted summary judgment in favor of defendant supervisors in plaintiff's action to recover for work-related injuries sustained while manually cleaning a paint coater, even though the evidence presented by plaintiff showed that both supervisors were aware that the coater was unguarded and required plaintiff to manually clean the coater, where there was no evidence from which a trier of fact could conclude that defendants engaged in conduct that was willful, wanton or reckless or that they were manifestly indifferent to the consequences of requiring plaintiff to manually clean the coater.

Judge GREENE dissenting.

REGAN v. AMERIMARK BUILDING PRODUCTS

[127 N.C. App. 225 (1997)]

Appeal by plaintiff from order dated 10 September 1996 by Judge Henry V. Barnette, Jr., in Wake County Superior Court. Heard in the Court of Appeals 4 June 1997.

Glenn, Mills and Fisher, P.A., by Robert B. Glenn, Jr., for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by David H. Batten and David K. Liggett, for defendant-appellee Amerimark Building Products, Inc.; and Womble, Carlyle, Sandridge & Rice, by David A. Irvin, for defendants-appellees Clem Fox and Michael Wlock.

WALKER, Judge.

Plaintiff was employed by defendant Amerimark Building Products, Inc. (Amerimark) and worked on "paint line No. 2" operating the "coater." As part of his job, plaintiff was required to clean a steel drum that was part of the coater. To clean the drum, plaintiff would scrape the drum with a piece of scrap metal while the paint line continued operating. On 7 April 1993, plaintiff was scraping the drum when his hand got caught and he was pulled into the coater. Plaintiff attempted to stop the paint line by using the two emergency cut-off switches; however, the switches failed to operate and did not stop the line. As a result of being pulled into the coater, plaintiff suffered severe and disabling injuries. At the time he was injured, plaintiff was under the supervision of defendants Wlock and Fox.

The coater was designed to have a "doctor blade" attached to it which guarded the coater's ingoing nip points and prevented an employee from having to manually scrape the blade. Although the coater originally had a "doctor blade," at some point prior to the injury in question it was removed and at the time of injury it lay on the floor beside the machine.

On 4 January 1993, Amerimark was issued citations for several serious violations of the Occupational Safety and Health Act (OSHA), including the failure to provide "[m]achine guarding . . . to protect operator(s) and other employees from hazards created by . . . ingoing nip points" on "paint line No. 2." The citations required Amerimark to abate or correct the violations on or before 11 January 1993. Amerimark sought an extension of time in which to abate the violations. With respect to the hazard created by the "ingoing nip points"

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on "paint line No. 2," Amerimark was given until 12 July 1993 to make the correction. Amerimark began efforts to abate other violations immediately; however, plaintiff was injured prior to the abatement of the OSHA violation relating to the coater which plaintiff was operating.

On 13 October 1993, plaintiff filed a complaint against Amerimark and co-employees Wlock and Fox alleging that the coater used by him lacked safety guards which would prevent him from having to place his hands into the machine. Further, he alleged that defendants knew that the emergency cut-off switches were not functioning properly at the time of the accident and failed to warn him. On 25 February 1994, the trial court granted defendants' motion to dismiss under Rule 12 (b)(6) for failure to state a claim upon which relief can be granted. This Court reversed the order dismissing the case. Thereafter, defendants moved for summary judgment which was granted by the trial court.

"Summary judgment is proper where the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law." *Silvers v. Horace Mann Ins. Co.*, 90 N.C. App. 1, 4, 367 S.E.2d 372, 374 (1988), *modified*, 324 N.C. 289, 378 S.E.2d 21 (1989). We must determine whether the plaintiff's forecast of evidence raises issues of fact regarding defendant Amerimark's liability under *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). *See also*, *Mickles v. Duke Power Co.*, 342 N.C. 103, 463 S.E.2d 206 (1995); and regarding the liability of defendants Wlock and Fox under *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985).

[1] As a general rule, the Workers' Compensation Act provides the exclusive remedy for employees injured in a workplace accident. N.C. Gen. Stat. § 97-9, -10.1 (1991). However, in *Woodson*, our Supreme Court carved a narrow exception to the general rule when it held that when an "employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct," an employee may maintain a tort action against the employer. *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228. Substantial certainty is more than a possibility or substantial probability of serious injury but is less than actual certainty. *Pastva v. Naegle Outdoor Advertising*, 121 N.C. App. 656, 658-59, 468 S.E.2d 491, 493 (1996).

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See also, *Mickles v. Duke Power Co.*, 342 N.C. 103, 463 S.E.2d 206 (1995). The elements of a *Woodson* claim are: (1) employer misconduct; (2) intentionally engaged in; (3) knowledge that the conduct is substantially certain to cause serious injury or death to an employee; and (4) that employee is injured due to the misconduct. *Id.* at 659, 468 S.E.2d at 206.

In *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993), a case with facts very similar to the case at hand, our Supreme Court concluded the evidence was insufficient to establish a *Woodson* claim. In *Pendergrass*, the plaintiff was injured when his employer instructed him to work at a machine knowing that certain dangerous parts were unguarded, in violation of OSHA regulations and industry standards. *Id.* at 238, 424 S.E.2d at 394. Our Supreme Court noted that “[a]lthough [the employer] may have known certain dangerous parts of the machine were unguarded when they instructed Mr. Pendergrass to work at the machine, we do not believe this supports an inference that they intended that Mr. Pendergrass be injured or that they were manifestly indifferent to the consequences of his doing so.” *Id.* See also, *Kolbinsky v. Paramount Homes, Inc.*, 126 N.C. 533, 485 S.E.2d 900 (1997).

In the instant case, the evidence considered in the light most favorable to the plaintiff shows that the employer was aware that the coater was unguarded; the unguarded coater was in violation of OSHA regulations; the employer was in fact cited with an OSHA violation for having no guard on the coater; and the unguarded coater required that the plaintiff clean it manually.

There was also evidence that Amerimark was working to satisfy OSHA requirements, and that OSHA had given permission for Amerimark to continue plant operations as well as permission to remedy the area in question beyond the date of injury. Moreover, there was no evidence of any serious injury prior to the injury to plaintiff while operating the coater in the same manner as plaintiff. In fact, plaintiff himself testified that he had previously cleaned the coater ten to twenty times per shift and that he was working seven days a week. There was no evidence that the cut-off switches were not working properly or that they were redesigned or rewired after this accident.

In sum, the plaintiff failed to present evidence that Amerimark knew that its action of requiring plaintiff to operate the coater without a guard was substantially certain to cause serious injury or

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death. Therefore, plaintiff has failed to produce evidence of an essential element of a *Woodson* claim. Accordingly, the trial court's granting of summary judgment in favor of defendant Amerimark was proper.

[2] We must next examine whether the trial court's grant of summary judgment in favor of defendants Wlock and Fox was proper. In *Pleasant v. Johnson*, 312 N.C. 710, 714, 325 S.E.2d 244 (1985), our Supreme Court carved another exception to the exclusive remedy doctrine in the context of conduct of a co-employee. In *Pleasant*, the co-employee defendant drove a truck in a company parking lot with the intention of getting as close to the plaintiff as possible without hitting him. The plaintiff was struck by the truck. The Court said that defendant's actions constituted willful, wanton and reckless negligence and although plaintiff was allowed to recover compensation benefits, he could also pursue a civil action against the defendant supervisor. *Id.* at 717, 325 S.E.2d at 249. Further, in defining such negligence the Court noted that when the conduct of the defendant is manifestly indifferent to the consequences of the act a constructive intent to injure may be inferred. *Id.* at 715, 325 S.E.2d at 248.

In *Pendergrass*, the plaintiff also brought a negligence claim against his supervisors. The Supreme Court upheld the dismissal of the claim on the basis that even if they instructed the plaintiff to work on a machine they knew was unguarded, this conduct did not support an inference that the supervisors were manifestly indifferent to the consequences of plaintiff working at the machine. *Pendergrass*, 333 N.C. at 238, 424 S.E.2d at 394.

Likewise, even though the evidence here shows that both Wlock and Fox were aware that the coater was unguarded and required plaintiff to manually clean the coater, there was no evidence from which a trier of fact could conclude that Wlock and Fox engaged in conduct that was willful, wanton or reckless or that they were manifestly indifferent to the consequences of requiring plaintiff to manually scrape the coater. Thus, the trial court's granting of summary judgment in favor of defendants Wlock and Fox was proper.

Affirmed.

Judge GREENE dissents.

Judge JOHN concurs.

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Judge GREENE dissenting.

I would reverse the trial court and remand for trial.

The evidence¹ viewed in the light most favorable to Mark Regan (plaintiff), *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986) (evidence at summary judgment hearing viewed in the light most favorable to the nonmovant), reveals that as an employee of Amerimark, plaintiff operated the “coater” on “paint line No. 2.” As part of his job, plaintiff was required to clean a steel drum that was part of the coater. To clean the drum plaintiff would scrape the drum with a piece of scrap metal while the paint line continued to operate. On 7 April 1993 plaintiff was scraping the drum when his hand was caught and he was pulled into the coater, resulting in a punctured right lung, broken neck, mangled right arm, and other serious injuries. At the time he was injured plaintiff was under the supervision of both Wlock and Fox.

The coater was designed to have a “doctor blade” attached to it which guarded the coater’s ingoing nip points and prevented the employee from having to manually scrape the drum. Although the coater originally had a “doctor blade,” at some point prior to the injury in question it was removed and at the time of the injury it lay on the floor beside the machine.

Amerimark equipped the coater with two emergency switches (E-stops) that would shut down the paint line if pressed. After his hand became caught in the coater, plaintiff attempted to stop the paint line by using the E-stops but they did not work. Marcy Regan, plaintiff’s wife, recalled a conversation between herself and Phillip McAllister (McAllister), Amerimark’s Human Resources and Training Manager, during which McAllister told her that plaintiff was “doing a routine procedure” when the accident occurred and that Amerimark was “aware that [the E-stops] were not functioning” and that “work orders had been done to repair them,” and “they just had not gotten around to that yet.” If plaintiff had been aware that the E-stops were not operational, he would not have scraped the drum while it was moving.

Plaintiff had been instructed on how to clean the coater by Jamie Nelson (Nelson), an employee of Amerimark. Nelson stated that it was “common knowledge in the plant that there was a risk of having

1. I review the evidence because I believe the summary of the evidence given by the majority fails to mention several important details.

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your hands or arms caught in the [coater] while . . . scraping” it. Nelson also revealed that the E-stops were “never tested and . . . painted shut” and nothing was done to make the E-stops operational. Plaintiff was cleaning the coater as he had been taught at the time his hand became caught in the coater. Other Amerimark employees, while cleaning the coater, had “come close to being seriously injured” when their rags and/or gloves had been “jerked off their hands when they hit a dry spot” on the coater drum, as happened to plaintiff. According to plaintiff, some of these employees bruised or burned their hands while cleaning the coater.

On 28 July 1992, prior to plaintiff’s injury, Wlock made a suggestion that a “doctor blade” be installed at the point where plaintiff was subsequently injured “so that the operators won’t have to reach in as often” to clean the drum. Wlock also suggested that a “line stop cable” be installed around the coater to enable the operator to easily stop it. According to Wlock’s suggestion form, while he did not know of any previous injuries occurring “in these areas, they are bad pinch points with the potential for disaster.” Despite making the suggestions, Wlock did not have them implemented. A report by Wlock dated 8 April 1993, after plaintiff’s injuries, states that his suggestions concerned the “very spot” where plaintiff was injured.

Maintenance manager John Swanik (Swanik) stated that he would not expect any of his employees to do anything he would not do and, referring to scraping the coater by hand, “this technique here, I would not do.”

On 4 January 1993 Amerimark was cited by the North Carolina Department of Labor, Division of Occupational Safety and Health, for several “serious”² violations of the Occupational Safety and Health Act (OSHA), including the failure to provide “[m]achine guarding . . . to protect operator(s) and other employees from hazard(s) created by . . . ingoing nip points” on “paint line No. 2.” McAllister stated that plaintiff’s injuries occurred at an ingoing nip point on “paint line No. 2.”

The citations required that Amerimark abate or correct the violations on or before 11 January 1993. On 8 January 1993 Amerimark

2. A “serious violation” exists “if there is a substantial probability that death or serious physical harm could result from a condition which exists” in the place of employment “unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation.” N.C.G.S. § 95-127(18) (1993).

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requested an extension of time in which to abate the violations. With respect to the hazard created by the “ingoing nip points” on “paint line No. 2,” Amerimark was given until 12 July 1993 to make the correction. At the time the extension was granted, OSHA informed Amerimark that although an extension was being granted, “you are to insure that your employees are not exposed to hazards while abatement is being accomplished.”

Immediately after plaintiff was injured Swanik installed a protective guard and a line stop cable on the coater where plaintiff was injured. The time to install both was approximately four hours and the cost was approximately \$300.00. Furthermore, most of the parts for both apparatus were already located at the Amerimark facility.

I

Claim against Amerimark

Some of the factors to be considered when determining if the employer had knowledge that the misconduct was substantially certain to cause serious injury or death to an employee include: (1) whether the activity giving rise to the injury was inconsistent with a current OSHA standard; (2) whether the employer had received, prior to the injury, a citation for an OSHA violation regarding the activity that gave rise to the injury; (3) whether the employer or its representative (*i.e.*, employee’s supervisor) had knowledge of the dangerousness of the activity engaged in by the employee; (4) whether with knowledge of the dangerousness of the activity, the employer or its representative directed the employee to perform the task; (5) whether there was a high probability that the activity engaged in by the employee was likely to cause death or serious bodily injury; and (6) whether there had been any prior serious injuries or death caused to an employee performing the activity in question. *See Woodson v. Rowland*, 329 N.C. 330, 346, 407 S.E.2d 222, 231-32 (1991); *see also Mickles v. Duke Power Co.*, 342 N.C. 103, 111, 463 S.E.2d 206, 211 (1995).

The evidence considered in the context of these factors and in the light most favorable to the plaintiff, reveals a genuine issue of fact as to whether Amerimark knew that operation of the coater was substantially certain to cause serious injury or death to plaintiff. I would therefore reverse the entry of summary judgment for Amerimark.³

3. I would reject the argument of Amerimark that *Mickles v. Duke Power Co.*, 342 N.C. 103, 463 S.E.2d 206 (1995), requires that we affirm the entry of summary judgment in this case. The Supreme Court in *Mickles* determined that because there had been only three “widely scattered instances [of injuries from roll-outs] over a sixteen-year

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Prior to plaintiff's injuries it was common knowledge throughout Amerimark that the practice of cleaning the coater by scraping the drum was dangerous. Swanik, the maintenance manager, indicated that the procedure to clean the coater drum taught to plaintiff was dangerous and something he would not do himself. Wlock, plaintiff's supervisor, knew of the danger, as evidenced by his suggestion to install more guards on plaintiff's coater. Despite this knowledge plaintiff was instructed that this was the proper way to clean the coater. Further, plaintiff's instructor, Nelson, as well as McAllister, knew that the E-stops vital to the operator's safety were not operational and in fact they did not operate properly when plaintiff tried to use them.

The operation of the coater without machine guarding to protect the employee was in violation of OSHA regulations and this was brought to the attention of Amerimark on 4 January 1993 when citations (alleging violations of current OSHA regulations) were issued by the North Carolina Department of Labor. The citations classified the violations as "serious," suggesting that there was a substantial probability that death or serious physical harm could result if the "ingoing nip points" were not properly guarded. Despite receipt of the citations Amerimark continued to operate the paint line without making any changes to the way the plaintiff operated the coater and without taking steps to protect the plaintiff.⁴

I acknowledge that there is no evidence that prior to the injuries received by the plaintiff any employee died or received serious bodily injury while operating the coater.⁵ The absence of any evidence on

period" and "over eleven million man-hours aloft without a single incident of roll-out" the forecast of evidence "indicates only that defendant was aware of the somewhat remote possibility" of roll-out. *Id.* at 111-12, 463 S.E.2d at 211-12. In that case the Court stated that defendant did not know its conduct was substantially certain to cause serious injury or death because, in part, defendant had never been cited "for an OSHA violation regarding roll-out, and OSHA standards at the time of Mickles' death" did not require any different equipment. *Id.* at 111, 463 S.E.2d at 211. In this case, Amerimark knew that the coater posed a threat to plaintiff and the knowledge of this danger was reaffirmed upon receipt of the "serious" OSHA citation.

4. Although Amerimark was given an extension of time (extending beyond the time the plaintiff was injured) in which to correct the violations, it was conditioned on the requirement that Amerimark not expose its employees to hazards "while abatement is being accomplished."

5. The record does show, however, that several employees had "come close to being seriously injured" when their rags and/or gloves had been "jerked off their hands when they hit a dry spot" on the coater drum.

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this factor, however, does not require entry of summary judgment for Amerimark, as the presence or absence of evidence on any factor(s) is not conclusive on the issue of the employer's knowledge (or lack of knowledge) of misconduct that is substantially certain to cause serious injury or death. *Regan v. Amerimark Bldg. Prods.*, 118 N.C. App. 328, 331, 454 S.E.2d 849, 852 ("No one factor is determinative in evaluating whether a plaintiff has stated a valid *Woodson* claim."), *disc. rev. denied*, 340 N.C. 359, 458 S.E.2d 189 (1995), *cert. denied*, 342 N.C. 659, 467 S.E.2d 723 (1996). Indeed in *Woodson* there was no evidence of any prior deaths or serious injuries by the defendant's employees arising from work in trenches. See *Pastva v. Naegele Outdoor Advertising*, 121 N.C. App. 656, 659, 468 S.E.2d 491, 492-93 (reversing dismissal of *Woodson* claim even though no evidence of prior serious injury or death), *disc. rev. denied*, 343 N.C. 308, 471 S.E.2d 74 (1996).

II

Claims against Fox and Wlock

This case is distinguishable from *Pendergrass*, relied upon by the majority. In this case the unguarded pinch-points on the coater could have been easily and cheaply fixed and both Wlock and Fox were aware of such problem but failed to follow up on Wlock's suggestion to install a "doctor blade" and take other measures to protect the coater operator. Further, plaintiff had been trained to rely on the E-stops to stop the line in case of an emergency, but evidence presented by plaintiff shows that the E-stops were not operable and failed when plaintiff attempted to use them.

If the E-stops were not operable and Wlock and Fox knew of this, but required plaintiff to continue operating the coater despite the knowledge that the coater was being operated in a dangerous manner, a reasonable person could conclude that Wlock's and Fox's conduct was manifestly indifferent to its consequences. As noted by this Court in an earlier opinion dealing with this same case, the "failure to inform plaintiff that the [E-stops] on his machine were not functioning properly demonstrates a much higher level of indifference to employee safety than that alleged in *Pendergrass*." *Regan*, 118 N.C. App. at 331, 454 S.E.2d at 852. Genuine issues of fact are presented and summary judgment as to Wlock and Fox was therefore error.

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PATRICIA NOURSE, PLAINTIFF v. FOOD LION, INC., DEFENDANT

No. COA96-1350

(Filed 19 August 1997)

1. Negligence § 154 (NCI4th)— grocery store—slip and fall—active negligence—genuine issues of material fact

The trial court erred in granting summary judgment in favor of defendant grocery store in an action to recover damages for plaintiff customer's slip and fall on a grape and water in defendant's produce department where the evidence presented genuine issues of material fact as to whether defendant was actively negligent (1) in failing to keep the floors inspected and cleared of debris; (2) in the manner in which it displayed its grapes; and (3) in failing to enforce methods of preventing the accumulation of debris on the floor.

2. Negligence § 154 (NCI4th)— grocery store—slip and fall—passive negligence—genuine issue of material fact

The trial court erred in granting summary judgment in favor of defendant grocery store in an action to recover damages for plaintiff customer's slip and fall on a grape and water in defendant's grocery store where there was a genuine issue of material fact raised as to whether defendant was passively negligent in failing, after constructive notice of the presence of grapes and water on its produce floor, to remove the grapes and water from the floor where plaintiff presented evidence from which a reasonable inference could have been drawn that the grapes on had been on the floor for a period of time prior to plaintiff's fall and the water on the floor could have come from the ice in the grape display.

3. Negligence § 146 (NCI4th)— grocery store—customer—slip and fall—contributory negligence—jury question

A jury question existed as to whether a reasonably prudent person would have looked down at the floor while shopping in a grocery store and avoided a slip and fall on grapes and water on the floor in defendant grocery store's produce department; therefore, the trial court erred in granting summary judgment in favor of defendant grocery store on the basis that plaintiff customer was contributorily negligent.

Judge JOHN dissenting.

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Appeal by plaintiff from judgment dated 1 July 1996 by Judge David Q. LaBarre in Wake County Superior Court. Heard in the Court of Appeals 4 June 1997.

J.B. Rouse, III & Associates, by Elizabeth Kennedy-Gurnee and Ginger L. Crosby, and Graham F. Gurnee, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by Elizabeth J. Hallyburton, for defendant-appellee.

GREENE, Judge.

Patricia Nourse (plaintiff) appeals from the entry of summary judgment in favor of Food Lion, Inc. (defendant) in an action to recover damages for her slip and fall in the defendant's produce department.

In her complaint the plaintiff alleges that while shopping in the defendant's store she slipped and fell "while walking past the produce aisle . . . that was littered with produce and liquid." She specifically alleges the defendant was negligent by failing:

- a. to properly keep an outlook to ensure that the floor surfaces were free of debris.
- b. to properly train agents and employees in methods of detecting and eliminating floor debris.
- c. to develop or enforce proper methods to see that produce and liquid did not accumulate on the floor.
- d. to adequately inspect the floor surfaces to detect dangerous situations in time to protect the public.
- e. to maintain a number of employees on duty to adequately ensure that dangerous situations could be detected in time to protect the public.
- f. to adequately design the produce counters at this store to protect the public from the dangerous and hazardous spillage of food stuffs and liquid onto the floor.
- g. to take all steps that defendant knew, or reasonably should have known were necessary to protect the public from hazards, known and unknown, that are encumbent [sic] in the operating of a food selling operation.

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Accompanying its motion for summary judgment were affidavits from the defendant's manager and other employees. The manager stated in his affidavit that it was his "regular practice to inspect the floor in the produce department at frequent intervals throughout [his] shift" and he had "no reason to think that the floor in the produce department was not being inspected and cleaned on [23 June 1990] according to customary procedure." He further stated that "[t]he floor in the produce department was routinely swept and mopped once an hour and as needed. During the peak traffic hours, from 4:00 p.m. to 7:00 p.m., it was not uncommon for the produce floor to be swept and mopped two to three times an hour if necessary" and that "there was a mat on the floor in front of the grape display case since grapes suffered most from handling by customers." He also testified that it was his "practice to inspect the floor as [he] moved about in the produce department." A produce clerk who was working at the time of the accident stated in his affidavit that he was "always careful to check the floor for any debris that might have fallen off the produce cart, either on its way to the front of the store or while it was being arranged in the display cases." It was also his custom "to be alert to anything a customer might fall over or slip on and to take immediate action to eliminate any potential hazard." He further stated that he did "not know who would have been the last employee to inspect and clean the floor in the area where the fall" occurred. Another employee working on the date of the accident stated in his deposition that "[i]t is the responsibility of each Food Lion employee to keep the store neat and clean. Employees are trained to do this and are expected to sweep regularly throughout the day and damp mop whenever necessary." He further stated that the manager on duty "regularly inspects the entire store area throughout the day," and such conduct "was the practice of management at Store 75 while I was there." He had "no reason to believe that the inspection and cleaning procedures which were followed on a daily basis at Store 75 were not being followed that day." The defendant also presented the following portion of the defendant's deposition of the plaintiff:

Q: If you had looked right down at the floor, would you have seen the grapes and water?

A: Probably.

Q: So, the grapes and water weren't hidden in any way?

A: No.

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In response to the defendant's motion for summary judgment the plaintiff presented evidence that although she was not looking down at the time of her fall and thus did not see any object that was definitively the cause of her fall, after her fall she did find one squashed green seedless grape which had turned brown stuck to the bottom of her shoe and her clothes were soaked with water from the floor, and there were eight to ten grapes lying on the floor nearby. The location where the plaintiff fell was between five to six feet from the grape display and she stated that she did not handle any grapes prior to her fall. None of the defendant's employees were in the produce department of the store when the plaintiff fell and there is no record of when the produce department was last inspected or cleaned before plaintiff fell. Both the plaintiff and Linda Lynch, a companion who was with her at the time she fell, stated that there was no rug or mat on the floor in front of the grape display. The plaintiff presented evidence that the grapes for sale were separated by pieces of wax paper on top of a pack of ice in an open plastic display case near a metal hanging scale used by customers to weigh produce.

The issues are whether genuine issues of material fact are presented as to (I) the defendant's active negligence; (II) the defendant's passive negligence; and (III) the plaintiff's contributory negligence.

In a premises liability case involving injury to an invitee, the owner of the premises has a duty to exercise " 'ordinary care to keep in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision.' " *Roumillat v. Simplistic Enters., Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992) (quoting *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 130 S.E.2d 281, 283 (1963)). To prove a breach of that duty of care the plaintiff (invitee) is required to show that the defendant (owner-proprietor) either "(1) negligently created the condition causing the injury," (active negligence) or "(2) negligently failed to correct the condition after actual or constructive notice of its existence" (passive negligence). *Id.* at 64, 414 S.E.2d at 342-43.¹ Evidence that the condition (causing the fall) on the premises existed for some period of time prior to the fall can support a finding of constructive

1. Active negligence "denotes some positive act or some failure in duty of operation which is equivalent of a positive act." Black's Law Dictionary 33 (6th ed. 1990). Passive negligence "is negligence which permits defects, obstacles, or pitfalls to exist on premises." *Id.* at 1034.

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notice. *See Morgan v. Tea Co.*, 266 N.C. 221, 228, 145 S.E.2d 877, 883 (1966) (evidence that “vegetable leaf . . . was mashed and bruised and that other debris was [on the floor]” supports submission of issue to jury on store owner’s negligence); *Long v. Food Stores*, 262 N.C. 57, 61, 136 S.E.2d 275, 278-79 (1964) (evidence of grapes on the floor “full of lint and dirt” sufficient to show that owner had knowledge of their presence).

A defendant is entitled to summary judgment as to “all or any part” of a claim, N.C.G.S. § 1A-1, Rule 56(b) (1990), “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [defendant] is entitled to judgment as a matter of law.” N.C.G.S. § 1A-1, Rule 56(c) (1990). Specifically, a premises owner is entitled to summary judgment in a slip and fall case if it can show either the non-existence of an essential element of the plaintiff’s claim or that the plaintiff has no evidence of an essential element of her claim. *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342. Only if the movant-defendant makes its showing is the nonmovant-plaintiff required to present evidence. *Bernick v. Jurden*, 306 N.C. 435, 441, 293 S.E.2d 405, 409 (1982). If the defendant makes its showing, the plaintiff is required to produce a forecast of evidence showing that there are genuine issues of material fact for trial. *Roumillat*, 331 N.C. at 63, 414 S.E.2d at 342. “All inferences of fact must be drawn against the movant and in favor of the nonmovant.” *Id.*

I

Active Negligence

[1] Plaintiff’s allegations that defendant was actively negligent are that the defendant failed to: (1) properly train employees “in methods of detecting and eliminating floor debris”; (2) “maintain a number of employees on duty to adequately ensure that dangerous situations could be detected in time to protect the public”; (3) “adequately design the produce counters at this store to protect the public from the dangerous and hazardous spillage of food stuffs and liquid onto the floor”; (4) “adequately inspect the floor surfaces” and “keep an outlook to ensure that the floor surfaces were free of debris”; and (5) “develop or enforce proper methods to see that produce and liquid did not accumulate on the floor.”

Our review of the evidence reveals genuine issues of material fact with respect to several of the issues raised by the pleadings. On the

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issue that the defendant *failed to properly "inspect" or "keep an outlook"* for debris on the floor, the defendant presented evidence that "[t]he floor in the produce department was routinely swept and mopped once an hour and as needed. During the peak traffic hours, from 4:00 p.m. to 7:00 p.m., it was not uncommon for the produce floor to be swept and mopped two to three times an hour if necessary." A produce clerk on duty the afternoon and evening of 23 June 1990 in the defendant's store stated that his responsibilities as produce clerk included "arranging the produce in the display cases, and inspecting the entire department frequently throughout the day" and that he "was always careful to check the floor for any debris that might have fallen off the produce cart, either on its way to the front of the store or while it was being arranged in the display cases." He also stated that while he "routinely inspected and cleaned the produce floor throughout the day," he did not "know who would have been the last employee to inspect and clean the floor in the area where the fall is supposed to have occurred."

In response the plaintiff presented evidence that the floors were dirty and that there was no evidence that the routine procedures were followed on this particular day. The plaintiff also testified that the grape she slipped on was brown, indicating that it had been on the floor for sometime (raising an inference that the floor had not been recently cleaned). This raises a genuine issue of material fact as to whether the defendant was negligent in failing to keep the floors inspected and cleared of debris.

As to plaintiff's allegation of *improperly designed grape display counters*, the plaintiff presented evidence that the scale used to weigh the grapes was located some five to six feet from the grape display counter, that the grapes were displayed on ice and were not contained in bags. The defendant did not refute this evidence. This evidence raises an issue of fact as to whether the defendant was negligent in its display of the grapes.

As to the allegation that the defendant *did not "develop or enforce" methods to prevent the accumulation of debris* on the floor, the defendant presented evidence that it kept a mat on the floor in front of the grape display at all times, except when the floor was being buffed. The plaintiff's evidence was that there was no mat in place at the time of the fall. This raises a genuine issue of fact.

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II

Passive Negligence

[2] In response to the plaintiff's allegations that the defendant knew or should have known of the hazards causing the plaintiff's fall and failed to warn the plaintiff, the defendant presented evidence that none of its employees were aware that there were either grapes or water on the floor. It also presented evidence in the form of the plaintiff's own statement that she did not know where the grapes came from or how long they or the water had been on the floor. The plaintiff introduced evidence that the grape stuck beneath her shoe was brown, thus giving rise to an inference that the grapes had been on the floor for some time. *See Morgan*, 266 N.C. at 228, 145 S.E.2d at 883. The inference that the grape had been on the floor for some period of time prior to the plaintiff's fall is supported by the presence of water on the floor. A reasonable inference is that the water came from ice (from the grape display) that had dropped on the floor and remained there long enough to melt. Thus a genuine issue of material fact is raised as to whether the defendant failed, after constructive notice of their presence, to remove the grapes from the floor.

III

[3] In the alternative, the defendant argues that summary judgment was proper on the grounds of the plaintiff's contributory negligence. Specifically the defendant argues that the evidence shows that if the plaintiff had been looking where she was walking, she would have seen the grapes and water on the floor and could have avoided the fall.

When a plaintiff does not discover and avoid an obvious defect, that plaintiff will usually be considered to have been contributorily negligent as a matter of law. However, "where there is 'some fact, condition, or circumstance which would or might divert the attention of an ordinarily prudent person from discovering or seeing an existing dangerous condition,' the general rule does not apply." *Price v. Jack Eckerd Corp.*, 100 N.C. App. 732, 736, 398 S.E.2d 49, 52 (1990) (material issues of fact exist as to plaintiff's contributory negligence where plaintiff failed to look down at floor and tripped over box on floor of drug store) (quoting *Thomas v. Dixon*, 88 N.C. App. 337, 341, 363 S.E.2d 209, 212 (1988)). As our Supreme Court has stated: "[t]he question is not whether a reasonably prudent person would have seen the [object] had he or she looked but whether a person

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using ordinary care for his or her own safety under similar circumstances would have looked down at the floor.” *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981).

In this case even assuming the plaintiff would have seen the grapes and water on the floor had she looked, a jury question is presented as to whether a reasonably prudent person would have looked down at the floor as she was shopping in the grocery store. A reasonably prudent person’s attention could easily be diverted by advertisements or fruit and vegetable displays. We cannot hold that as a matter of law under these circumstances the plaintiff in the exercise of “ordinary care” should have looked down at the floor.

In summary, because there are genuine issues of material fact presented on at least one of the issues relating to the defendant’s negligence and as to the plaintiff’s contributory negligence, summary judgment was improper.

Reversed and remanded.

Judge JOHN dissents with separate opinion.

Judge WALKER concurs.

Judge JOHN dissenting.

I respectfully dissent.

Plaintiff in her deposition testimony stated she had “no idea” how long the grapes had been on the store floor and that she did not know where they came from or how they or the water got on the floor. She also indicated she had no knowledge that any employees of defendant were aware of water or grapes on the floor where she fell. Defendant’s evidence in no way provided this information, and defendant thus carried its summary judgment burden of demonstrating the absence of an essential element of plaintiff’s claim, *i.e.*, actual or constructive notice on the part of defendant of the condition alleged to have caused plaintiff’s fall. *See Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 343 (1992), *Farrelly v. Hamilton Square*, 119 N.C. App. 541, 544, 459 S.E.2d 23, 26 (1995), *Padgett v. J.C. Penny Co., Inc.*, 112 N.C. App. 842, 845, 437 S.E.2d 401, 403 (1993), *Hill v. Supermarkets*, 42 N.C. App. 442, 448, 257 S.E.2d 68, 71 (1979), *Hinson v. Cato’s, Inc.*, 271 N.C. 738, 739, 157 S.E.2d 537, 538 (1967), *Smith v. Hickory*, 252 N.C. 316, 318, 113

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S.E.2d 557, 559 (1960), *Revis v. Orr*, 234 N.C. 158, 160-61, 66 S.E.2d 652, 654 (1951), and *France v. Winn-Dixie Supermarket*, 70 N.C. App. 492, 492, 320 S.E.2d 25, 25 (1984), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 889 (1985).

Moreover, the record further reflects plaintiff's contributory negligence. The majority properly notes established law that one who "does not discover and avoid an obvious defect . . . will usually be considered to have been contributorily negligent as a matter of law." However, the majority further relies on *Price v. Jack Eckerd Corporation*, 100 N.C. App. 732, 736, 398 S.E.2d 49, 52 (1990) as creating a jury question concerning plaintiff's contributory negligence, asserting that "a reasonably prudent person's attention could easily be diverted by advertisements or fruit and vegetable displays."

In *Price*, evidence was presented that the plaintiff sought directions from an Eckerd's employee to locate a product. *Id.* Thereafter,

the cashier pointed toward the prescription department. The plaintiff looked toward the prescription department and noticed advertisements hanging from the ceiling. Paying attention to the cashier's directions, the plaintiff turned and began walking.

Id. The plaintiff then tripped over a box on the store floor. *Id.*

Evidence in the *Price* record thus raised an issue of fact regarding whether the plaintiff's attention was diverted by the cashier's pointing or by the advertisements. The majority herein perceives an issue of fact to be raised by its unsubstantiated determination that plaintiff's "attention *could easily [have been]* diverted" (emphasis added) and not by any evidence in the record tending to show plaintiff's attention indeed *was* diverted.

Based on the foregoing, I vote to affirm the trial court's grant of summary judgment.

I further dissent from the majority's artificial division of the issue of defendant's negligence into "active" and "passive" categories. While negligence may indeed be characterized as active or passive, the majority cites no decision of our courts setting out such a differentiation for purposes of summary judgment analysis. In the case *sub judice*, the distinction is at best unnecessary and potentially confusing.

Finally, I dissent from any implication in the majority opinion that would require the trial court, or this Court on appeal, to evaluate the

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evidence as to every material fact and to render a summary judgment decision as to each. The time-honored rule is that if “a [single] genuine issue of material fact does exist, the motion for summary judgment *must* be denied.” *Vassey v. Burch*, 301 N.C. 68, 73, 269 S.E.2d 137, 140 (1980) (citation omitted) (emphasis added).

DIANE FUTRELLE, PLAINTIFF v. DUKE UNIVERSITY, SUSAN J. FEINGLOS,
PATRICIA L. THIBODEAU, DEFENDANTS

No. COA96-902

(Filed 19 August 1997)

1. Appeal and Error § 124 (NCI4th)— denial of motion to confirm arbitration—interlocutory order—immediate appeal

An interlocutory order denying defendants’ motion to confirm an arbitration award and to dismiss plaintiff’s action for breach of contract, wrongful discharge, and defamation involved a substantial right and was immediately appealable.

2. Accord and Satisfaction § 8 (NCI4th)— arbitration award—acceptance and cashing of check

Plaintiff university medical librarian’s acceptance and cashing of a check from defendant university pursuant to an arbitration award in a dispute concerning her termination by her supervisors and the university constituted an accord and satisfaction, although the check did not contain the words “payment in full,” where the undisputed facts show (1) that defendants intended the check to be full and final payment resolving the dispute, and (2) that plaintiff understood defendants’ intent.

3. Arbitration and Award § 33 (NCI4th)— cashing of check—ratification of arbitration award

Plaintiff ratified an arbitration award when she accepted and cashed defendants’ check paid pursuant to the award.

4. Arbitration and Award § 36 (NCI4th)— wrongful termination—arbitration award—cashing of check—waiver of related claims

Plaintiff university medical librarian’s acceptance and cashing of defendant university’s check constituted an accord and sat-

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isfaction and ratification of an arbitration award pertaining to a dispute as to whether she was wrongfully terminated by defendant university which waived any right to bring future claims arising out of or related to the termination where the letter sent by defendant university with the check stated that payment was being made in accordance with the arbitration award; the stipulated arbitration issue was whether plaintiff was terminated in violation of the law or university policy; and the arbitration award referred to provisions of the university's dispute resolution procedure regarding the binding effect of arbitration. Therefore, plaintiff's claims for breach of contract and wrongful discharge, which related directly to whether she was wrongfully terminated, and her defamation claims, which arose out of and were directly related to her termination, were barred and should have been dismissed by the trial court.

Appeal by defendants from order entered 24 April 1996 by Judge F. Gordon Battle in Orange County Superior Court. Heard in the Court of Appeals 2 April 1997.

Michael B. Brough & Associates, by Stephen D. Brody and Michael B. Brough, for plaintiff-appellee.

Fulbright & Jaworski L.L.P., by John M. Simpson, for defendant-appellants.

McGEE, Judge.

In November 1992, plaintiff was hired by Duke University (Duke) for a specified term of employment as a Learning Resources Librarian at the Duke University Medical Center Library (Library). Plaintiff became an "exempt employee" meaning that she was not subject to a collective bargaining agreement. Duke contends, and plaintiff disagrees, that Duke's Exempt Staff Member Dispute Resolution Procedure (DRP) became part of plaintiff's employment contract when she was hired.

In September 1994, plaintiff requested permission from Susan Feinglos, her supervisor, to attend a professional conference. Defendants contend Feinglos denied the request. Plaintiff contends Feinglos authorized her to attend the conference if she completed equipment specifications for a work project. Plaintiff attended the conference and was absent from the workplace on 29 September and 30 September 1994. On 29 September 1994, plaintiff contacted

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Feinglos from the conference site at which time Feinglos told plaintiff she had not been given permission to attend the conference. Upon plaintiff's return to work on 3 October 1994, Feinglos handed her a termination letter. Another supervisor, Patricia L. Thibodeau, escorted plaintiff to her office and told her to pack her belongings and leave the premises.

Plaintiff contends Feinglos sent a copy of the termination letter to Gordon Hammes, an administrator with Duke University Medical Center. She also contends that, shortly after her termination, Thibodeau attended a professional conference and told one or more persons in attendance that plaintiff was terminated for "willful insubordination." Plaintiff further contends Thibodeau told several of plaintiff's professional colleagues at the Library that plaintiff had been terminated for willful insubordination, grave misconduct, and a poor work performance history.

Plaintiff challenged her dismissal through the DRP. After proceeding through various steps of review under DRP, plaintiff requested arbitration under Article IV of DRP which provides that the decision of the arbitration panel "shall be final and binding between the parties as to all claims which were or could have been raised in connection with the dispute, to the full extent permitted by the United States Arbitration Act." In the letter requesting arbitration, plaintiff's attorney stated plaintiff's "request is made without prejudice to [her] right to pursue any other form of relief" and that it was his understanding that arbitration "would not have any preclusive effect." In this letter, he asked Duke to respond if it had a contrary understanding so that plaintiff would have the opportunity to withdraw her request for arbitration. In a response letter, Duke's attorney accepted plaintiff's request for arbitration but also stated "I am enclosing a copy of the University's exempt staff member dispute resolution procedure, which answers the other questions in your letter."

The parties then proceeded with arbitration before a panel of the American Arbitration Association. In an award issued 6 July 1995, the panel concluded plaintiff was intentionally insubordinate but that termination was too harsh because she had no past incidents of discipline on her record and had not received any corrective discipline prior to termination. The panel further concluded the appropriate penalty was reinstatement with three month's back pay and benefits. However, the panel also quoted from a DRP provision which gives Duke the discretion to pay severance pay in lieu of reinstatement and

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concluded, in reference to this option, that “the parties are bound by that language, if it is properly executed and enforced.”

In July 1995, Duke’s attorney informed plaintiff that Duke was exercising its discretion under the DRP to pay severance pay in lieu of reinstatement and enclosed a check in the amount of \$16,158.69. In her affidavit, defendant Thibodeau asserts this check cleared Duke’s account in August 1995. Accompanying the check was a letter from Duke University Counsel which stated:

In accordance with the Arbitration Panel’s Award, [the defendant] is enclosing a check payable to [plaintiff] which includes payment for six (6) months severance pay (in lieu of reinstatement); for three (3) months backpay; and for vacation accrued for such three (3) months backpay; and for vacation accrued for such three (3) month period.

On 3 October 1995, plaintiff filed this action against defendants seeking damages for breach of contract, wrongful discharge, and defamation. On 15 November 1995, defendants moved to confirm the arbitration award and to dismiss the action. By order filed 24 April 1996, Judge F. Gordon Battle denied defendants’ motion. Defendants appeal.

I.

[1] We first note this appeal is interlocutory because the order denying defendants’ motion to confirm the arbitration award and dismiss the action “‘does not determine the issues but directs some further proceeding preliminary to final decree.’” *See Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978) (quoting *Greene v. Laboratories, Inc.*, 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961)). However, we have held an “order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.” *Bennish v. North Carolina Dance Theater*, 108 N.C. App. 42, 44, 422 S.E.2d 335, 336 (1992) (quoting *Prime South Homes v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991)). Similarly here, we hold the order denying defendants’ motion involves a substantial right because the right to arbitration would effectively be lost if appeal is delayed.

We initially recognize that “North Carolina has a strong public policy favoring arbitration.” *Red Springs Presbyterian Church v. Terminix Co.*, 119 N.C. App. 299, 303, 458 S.E.2d 270, 273 (1995). The essential thrust of the Federal Arbitration Act, which is in accord

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with the law of our state, is to require the application of contract law to determine whether a particular arbitration agreement is enforceable; thereby placing arbitration agreements "upon the same footing as other contracts." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 134 L. Ed. 2d 902, 909 (1996) (citations omitted). It is essential that parties to an arbitration specify clearly the scope and terms of their agreement to arbitrate as enforcement of arbitration agreements is not subject to less scrutiny than the enforcement of other agreements.

[2] Defendants contend plaintiff was bound by the arbitration award pursuant to her employment contract and, in the alternative, by her participation in arbitration under the DRP, and that the trial court therefore erred by failing to confirm the award and denying their motion to dismiss. We do not reach the merits of whether there was a valid agreement to arbitrate, however, because we hold plaintiff's acceptance of defendants' payment pursuant to the arbitration award constitutes both an accord and satisfaction and a ratification of the arbitration award.

In its order denying defendants' motion to confirm the award and to dismiss plaintiff's claims, the trial court stated it reviewed the pleadings and affidavits filed in support of and in opposition to this motion. When a trial court considers matters outside the pleadings, a motion to dismiss may be converted into a motion for summary judgment. *King v. Durham County Mental Health Authority*, 113 N.C. App. 341, 345, 439 S.E.2d 771, 774 (1994). In addition, here the issue of accord and satisfaction may be resolved as a matter of law since there are no material facts in issue surrounding the delivery and acceptance of defendants' payment. "Although the existence of accord and satisfaction is generally a question of fact, 'where the only reasonable inference is existence or non-existence, accord and satisfaction is a question of law and may be adjudicated by summary judgment when the essential facts are made clear of record.'" *Zanone v. RJR Nabisco*, 120 N.C. App. 768, 771, 463 S.E.2d 584, 587 (1995).

Article 3 of the Uniform Commercial Code is invoked when a dispute arises over a payment made with a negotiable instrument, such as the check issued by the defendants to plaintiff. See N.C. Gen. Stat. § 25-3-102 (1995) (discussing scope of Article 3); see also N.C. Gen. Stat. § 25-3-104 (1995) (defining "negotiable instrument"). Under this article, a payment by a party may constitute an accord and satisfaction of a dispute if the following requirements are met:

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(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(b) . . . the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

N.C. Gen. Stat. § 25-3-311 (1995).

In *Zanone*, RJR Nabisco by letter offered former employee Zanone a \$5000 check as “full and final payment of [Zanone’s] severance relocation associated benefits.” *Zanone*, 120 N.C. App. at 772, 463 S.E.2d at 588. Although RJR’s letter was not marked “payment in full” or accompanied by a letter explaining it was “payment in full,” this Court found the letter “established RJR’s intent [that] the \$5000 check be treated as an accord” because the facts and circumstances surrounding receipt of a check may establish an accord and satisfaction. *Id.* Upon receipt of RJR’s letter, Zanone responded stating he regretted he could not accept the offer as final and he believed \$5000 to be insufficient. *Id.* at 772-73, 463 S.E.2d at 588. RJR then mailed the check to Zanone who cashed it. This Court found: “[a]lthough Zanone registered his objection to the \$5000 amount by letter . . . , he had no further communication with RJR concerning the disputed debt prior to cashing the \$5000 check.” *Id.* at 774, 463 S.E.2d at 589. This Court concluded “Zanone received the \$5000 check clearly understanding RJR was offering the \$5000 check as ‘full and final’ payment of the disputed debt” and held there was accord and satisfaction as a matter of law barring Zanone’s breach of contract claim. *Id.* at 774-75, 463 S.E.2d at 589.

Similarly here, defendants have established, as a matter of law, the Article 3 requirements for accord and satisfaction. Defendants have introduced undisputed evidence that they tendered to plaintiff in good faith a check for \$16,158.69. By affidavit defendant Thibodeau testified this check cleared Duke’s account in August 1995. Plaintiff has presented no evidence to contest defendants’ assertion that plaintiff cashed the check. The requirement, that a dispute exist, is satisfied in that, prior to payment of this amount, the

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parties disputed what remedy, if any, plaintiff was entitled to receive because of defendants' decision to terminate her employment contract. The requirement of a conspicuous statement that the instrument is tendered as full satisfaction of the claim is satisfied by the letter from Duke University Counsel which accompanied the check. This letter acknowledges receipt of the arbitration panel's decision and states defendants are exercising their discretion to pay severance pay in lieu of the reinstatement ordered in the arbitration award. The letter states the check is enclosed "[i]n accordance with the Arbitration Panel's Award." As in *Zanone*, the omission of the words "payment in full" does not prevent the accord and satisfaction given the facts and circumstances surrounding payment and receipt of the check. We hold there was an accord and satisfaction as a matter of law because the undisputed facts show the following to be the only reasonable inferences regarding the parties' intent: (1) that defendants intended the check to be full and final payment resolving the dispute and (2) that given the reference to the final arbitration award, plaintiff understood that this was defendants' intent.

[3] Furthermore, by cashing the check as presented to her, plaintiff effectively ratified the arbitration award. The Oregon Court of Appeals reached a similar conclusion in *Harrington v. Warlick*, 758 P.2d 387 (Or. App. 1988). In *Harrington*, the court held that the defendants waived their right to appeal an arbitration award when they accepted the award. *Id.* at 388. Although here the issue is whether a party may collaterally attack an arbitration award through civil action rather than whether the party may appeal the award, we find the same principles apply. Thus, we hold plaintiff ratified the arbitration award when she accepted defendants' check paid pursuant to the award. For this reason, the trial court erred by failing to confirm the arbitration award.

II.

[4] Since the trial court erred by denying the motion to confirm the arbitration award, upon remand the trial court is directed to confirm and enter judgment on the award. Once judgment is entered upon the arbitration award, it will then operate "as an estoppel not only as to all matters actually determined or litigated in the prior proceeding, but also as to all relevant and material matters within the scope of the proceeding which the parties, in the exercise of reasonable diligence, could and should have brought forward for determination." *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 22, 331 S.E.2d 726, 730 (1985),

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disc. rev. denied, 315 N.C. 590, 341 S.E.2d 29 (1986). Since all claims within the scope of the arbitration proceeding are barred by judgment on the award, we must determine the scope of the accord and satisfaction and plaintiff's ratification of the arbitration award and the resulting impact on plaintiff's claims.

In determining whether the parties agreed to submit a particular dispute or claim to arbitration, we must look to the language in the agreement. *Id.* at 23-24, 331 S.E.2d at 731. "Whether denominated accord and satisfaction or compromise and settlement, the executed agreement terminating or purporting to terminate a controversy is a contract, to be interpreted and tested by established rules relating to contracts." *Casualty Co. v. Teer Co.*, 250 N.C. 547, 550, 109 S.E.2d 171, 173 (1959). In an accord and satisfaction, the accord is the agreement and the satisfaction is execution of the performance of the agreement. *Bizzell v. Bizzell*, 247 N.C. 590, 601, 101 S.E.2d 668, 676, *cert. denied*, 358 U.S. 888, 3 L. Ed. 2d 115 (1958), *reh'g denied*, 358 U.S. 938, 3 L. Ed. 2d 310 (1959); *Bumgarner v. Tomblin*, 63 N.C. App. 636, 642, 306 S.E.2d 178, 183 (1983). Here, the letter sent by defendants along with the check states the payment is being made "[i]n accordance with the Arbitration Panel's Award." By so referencing the award, this letter effectively incorporated the terms of the arbitration award making the terms of the award part of the offer of settlement included in the accord. Plaintiff's ratification of the award by cashing the check effected her acceptance of the accord terms.

The stipulated issue of the arbitration stated in the arbitration award was whether the plaintiff was "terminated in violation of the law or University policy." Given this stipulation, we hold plaintiff's claims for breach of contract and wrongful discharge, both of which relate directly to whether she was wrongfully terminated, are barred and should have been dismissed. The award also states that it is "based on the entire record, the Exempt Staff Member Dispute Resolution Procedure [DRP] and the facts and circumstances of this case." Section E of the DRP provides "[t]he decision of the panel shall be final and binding between the parties as to all claims which were or could have been raised in connection with the dispute, to the full extent permitted by the United States Arbitration Act." The award further states that the parties are bound by language in the DRP which gives defendants the option to pay severance pay in lieu of reinstatement. Since the arbitration award, ratified by plaintiff, directly references the DRP provisions regarding the binding effect of arbitration and states that it is based on the DRP, we hold, as a mat-

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ter of law, that plaintiff accepted the resolution of the dispute based solely on the stipulated issue and waived any right to bring future claims arising out of or related to the termination when she ratified the award by accepting the check in satisfaction of the dispute. Since the slander and libel claims clearly arise out of and are directly related to her termination, these claims should be dismissed.

We note that parties entering into arbitration should exercise great care to delineate the precise claims and disputes to be resolved and to reserve specifically any claims they wish not to be precluded by the arbitration. As this Court has previously emphasized:

A party is required to bring forth the whole case at one time and will not be permitted to split the claim or divide the grounds for recovery; thus, a party will not be permitted, except in special circumstances, to reopen the subject of the arbitration or litigation with respect to matters which might have been brought forward in the previous proceeding.

Rodgers Builders, 76 N.C. App. at 23, 331 S.E.2d at 730.

In summary, the trial court erred by not confirming the arbitration award and by not dismissing all of plaintiff's claims.

Reversed and remanded.

Judges COZORT and MARTIN, John C., concur.

Judge Cozort participated in this opinion prior to his resignation on 31 July 1997.

STATE OF NORTH CAROLINA v. KENTON THOMAS STINSON

No. COA96-875

(Filed 19 August 1997)

1. Kidnapping § 24 (NCI4th)— first-degree kidnapping, rape, indecent liberties—instructions—reliance on same sexual act—judgment arrested

Judgment was arrested on a first-degree kidnapping conviction and the case remanded for resentencing on second-degree

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kidnapping where defendant was convicted of first-degree kidnapping, second-degree rape, and indecent liberties and an ambiguity in the trial judge's instructions made it impossible to determine whether the jury relied on the same sexual act to convict defendant of first-degree kidnapping, and/or second-degree rape and indecent liberties.

2. Kidnapping § 26 (NCI4th)— first-degree kidnapping— instruction on felonious restraint—denied—insufficient evidence

The trial court did not err by instructing the jury on first-and second-degree kidnapping but refusing to instruct the jury on felonious restraint as a lesser included offense where there was no evidence presented by either party that the victim was restrained for any purpose other than a sexual assault.

3. Evidence and Witness § 1255 (NCI4th)— statements to detective—subsequent to invocation of right to counsel— initiated by defendant

The trial court did not err by denying defendant's motion to suppress statements he made to a police detective after invoking his right to counsel where defendant made the statement while handcuffed and being transported to the Intake Center immediately after asking for an attorney. The detective's conduct was not reasonably likely to elicit a response from defendant; rather, it is the type of conduct which regularly occurs in the daily practice of law enforcement.

Appeal by defendant from judgments entered 17 January 1996 by Judge James U. Downs in Mecklenburg County Superior Court. Heard in the Court of Appeals 2 April 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Sondra C. Panico, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant Kenton Thomas Stinson.

McGEE, Judge.

Defendant appeals judgments convicting him of first degree kidnapping, second degree rape and indecent liberties filed 11 January 1996. The State's evidence tended to show that on the morning of 16

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September 1994 the 14-year-old victim and her younger brother missed the school bus and rode the city bus to downtown Charlotte. The two children went to Big Ben's Grocery Store (Big Ben's) where they called their grandmother for a ride home. While at the store, they were approached by defendant who offered to drive the children to their grandmother's home. The children accepted and voluntarily entered defendant's car. The victim's brother told defendant to take him to his uncle's house and the victim asked to be taken to her grandmother's house.

The victim testified that after defendant had taken her brother to his uncle's house, defendant then asked the victim, who had remained in the car, how she intended to pay him for the ride and asked if she wanted to go to the park with him. Defendant then drove past the victim's grandmother's house without stopping despite the victim's statement that she could not go with him because her grandmother would be looking for her. Once they arrived at the park, defendant parked near the woods and began to kiss the victim and attempted to pull her pants down. She told defendant "no" but defendant did pull her pants down. The victim then told defendant "no" again, but defendant again pulled her pants down and told her that she had "no other choice because ain't nobody out here." The victim testified that the angry tone of defendant's voice scared her and made her think defendant "would kill [her] or something." The victim then testified defendant climbed on top of her and pushed back the car seat. She told defendant to use a condom because she was menstruating. After putting on a condom, defendant then had sex with her. After he was done he said to the victim, "Are you sure you're 14; because, you make love like you're 18." The victim further testified that she then put her clothes back on and he drove her home without making any stops.

The victim told her grandmother she had been raped and she was taken to the hospital where she was examined by Dr. Timothy Scott Missbach. Dr. Missbach testified that although he found no internal or external trauma, his findings were consistent with the victim's statement that she had been raped.

Detective Willie Lynn interviewed the victim and she described defendant and his car to the detective. Based on the victim's description and the detective's subsequent interview of an employee at Big Ben's where defendant had negotiated checks, the detective identified the temporary service where defendant worked, and from this

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source obtained defendant's address in Concord, North Carolina. After obtaining a warrant for defendant's arrest, the detective went to the Concord Police Department on 26 October 1994, and later that day accompanied Lieutenant Arthur of the Concord Police Department to defendant's house in a marked car. Detective Lynn told defendant of the warrants and defendant agreed to go to the Charlotte police department with him. Defendant was placed in an interrogation room upon arrival.

Inside the interrogation room, Detective Lynn read defendant his Miranda rights and asked defendant to sign a waiver of rights form. Defendant did not sign the form but instead wrote on it that he was afraid to sign and wanted a lawyer. The detective placed handcuffs on defendant and placed him in a police car and began escorting him to the Intake Center. On the way to the Intake Center defendant began to tell Detective Lynn his version of what had occurred on the day the alleged kidnapping took place. Defendant was advised by Detective Lynn that he did not have to talk to him. Defendant then told the detective that he wanted to cooperate and proceeded to tell Detective Lynn that he had given the victim and her brother a ride home and that after the brother was dropped off at his uncle's house, he asked the victim, who remained in the car, if she wanted to "hang out with him." According to defendant, the victim said "yes." He then drove to the park and told the victim to take off her pants. He admitted that he had consensual intercourse with the girl and that digital penetration of the girl had occurred. He then stated that he drove the girl home after stopping to buy her some chips and something to drink.

At the close of the evidence, the trial judge instructed the jury on first degree kidnapping, indecent liberties with a minor, and second degree rape. The trial judge instructed the jury in part that in order to enter a verdict of guilty on the first degree kidnapping charge, the jury must find:

[f]irst, that the defendant, unlawfully confined [the victim]. . . . that is, that he imprisoned her, within a given area; and/or that he restrained her person. That is, [he] restricted her freedom of movement; and/or that he removed [the victim] from one place to another.

. . . [the victim] had not reached her 16th birthday; and, that her parent, guardian and/or custodian, did not consent to this confinement, and/or restraint, and/or removal.

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Consent obtained or induced by fraud or fear is not consent.

Third, . . . that the defendant confine[d] and/or restrain[ed]; and/or removed [the victim] for the purpose of committing second-degree rape.

The trial judge also instructed the jury that to convict the defendant of second degree rape it must find that the State proved three elements:

[f]irst, that the defendant engaged in vaginal intercourse with [the victim]. Vaginal intercourse is the penetration, however slight, of the female sex organ by the male sex organ; and, the actual emission of semen is not even necessary.

Second, that the defendant used or threatened to use force sufficient to overcome any resistance that [the victim] might have made.

The force necessary to constitute rape does not have to be actual physical force. Fear or coercion may take the place of physical force.

And [third] . . . that [the victim] did not consent . . . that is, the vaginal intercourse, was against her will.

The trial judge also instructed the jury that “indecent liberties” is defined as “immoral, improper or indecent touching or act by the defendant upon the child” and to convict defendant on this charge, the jury must find:

[t]hat [defendant] engaged in vaginal intercourse with [the victim] and/or that he penetrated her vaginal area or vagina with his finger. . . . that the [victim] had not reached [her] 16th birthday . . . that the defendant was at least 5 years older than the child; and had reached his 16th birthday, at that time.

The jury found defendant guilty of all charges and he was sentenced to forty years in prison for first degree kidnapping, a consecutive term of forty years for second degree rape, and ten years for taking indecent liberties with a minor consecutive to the rape conviction.

[1] The defendant argues that his Fifth Amendment rights against double jeopardy were violated when he was convicted of first degree kidnapping, second degree rape, and indecent liberties based on the

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sexual intercourse and digital penetration of the victim. We agree. In North Carolina, kidnapping is elevated from a second degree crime to a first degree crime “[i]f the person kidnapped was not released by the defendant in a safe place or had been seriously injured or *sexually assaulted*.” N.C. Gen. Stat. § 14-39(b) (1994) (emphasis added). If the defendant is convicted of other crimes for actions committed against the kidnapped victim, these same actions cannot be used to satisfy the sexual assault element of the kidnapping conviction to elevate the conviction to first degree. *State v. Belton*, 318 N.C. 141, 161, 347 S.E.2d 755, 767 (1986), *overruled on other grounds*, *State v. Gaines* 345 N.C. 647, 483 S.E.2d 396 (1997). As our Supreme Court stated in *Belton*, the principal case relied on by defendant in his appeal, if “the rape of [the victim] was the only sexual assault which could have formed the ‘sexual assault’ element of the first degree kidnapping” defendant is charged with, defendant cannot be convicted of both crimes. *Id.* We hold that this case is controlled by *Belton*. As in *Belton*, the defendant in this case was convicted of more than one crime arising out of his sexual encounter with the victim. The State argues that this case is distinguished from *Belton* “because there was more than one sexual assault committed by the defendant.” Specifically the State argues that because the acts of vaginal rape and digital penetration are two distinct acts, the jury could have found that the digital penetration, rather than the vaginal rape, constituted the sexual assault element of first degree kidnapping, and thus there would be no violation of defendant’s rights against double jeopardy for the rape conviction and the first degree kidnapping conviction. The State’s argument is mere speculation as the trial court did not instruct the jury of this limitation necessary to avoid double jeopardy. There is nothing in the record to so indicate that without this limiting instruction the jury did not rely on evidence of the same sexual act for either or both the rape and indecent liberties conviction in addition to relying on the same sexual act for the first degree kidnapping conviction. The protection of a defendant’s constitutional rights must be guaranteed, and our Supreme Court has “held that it cannot assume the jury adopted a theory favorable to the state” not in violation of the defendant’s rights when there are “alternative theories of conviction . . . available to a jury” and must construe the “ambiguity in favor of defendant.” *Id.* at 162, 347 S.E.2d at 768. We thus find error in the trial judge’s instructions as there is ambiguity as to whether the jury relied on the same sexual act to convict for first degree kidnapping and/or second degree rape and indecent liberties.

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We must next determine the proper procedure to cure this error. Our Supreme Court has suggested two possible remedies in a case involving a first degree kidnapping and a rape conviction: "(1) arrest judgment on the first degree kidnapping conviction and resentence defendants for second degree kidnapping or (2) arrest judgment in either the rape or the sex offense convictions." *Id.* at 161, 347 S.E.2d at 767. Because it is impossible to determine from the record whether the same sexual acts used for the rape and indecent liberties convictions were the basis of the jury's first degree kidnapping conviction, we cannot ascertain whether either or both of these convictions in combination with the kidnapping conviction is unconstitutional. Rather than arresting judgment on both the rape and indecent liberties convictions, the remedy most consistent with the jury's verdict and the one we order is to arrest judgment on the first degree kidnapping conviction and remand the case to the trial court to resentence defendant for second degree kidnapping. The remaining judgments are not affected.

[2] Defendant next argues the trial court erred by instructing the jury on first and second degree kidnapping and refusing to instruct the jury on felonious restraint as a lesser included offense. We disagree. The distinction between felonious restraint and the kidnapping instruction is that the former does not require the state to prove defendant's purpose for the restraint. A trial court is only required to instruct the jury on a lesser included offense when there is evidence presented from which the jury could find that such offense was committed. *State v. Shaw*, 106 N.C. App. 433, 439, 417 S.E.2d 262, 266, *cert. denied*, 333 N.C. 170, 424 S.E.2d 914 (1992). "[W]hen the defendant denies having committed the complete offense for which he is being prosecuted, and evidence is presented by the State of every element of the offense, and there is no evidence to negate these elements other than the defendant's denial that he committed the offense, then no lesser included offense need be submitted." *Id.* "The mere contention that the jury might accept the State's evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense." *State v. Cerate*, 109 N.C. App. 344, 351, 427 S.E.2d 124, 128 (1993). In this case defendant denied restraining the victim for any purpose. The only evidence presented by the State as to this element is that defendant restrained the victim for the purpose of sexually assaulting her. As there was no evidence presented by either party that she was restrained for any other purpose than a sexual assault, no instruction for a lesser included offense of felonious restraint is required. *Id.*

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[3] Next defendant argues the trial court erred in denying his motion to suppress statements made to Detective Lynn after he had invoked his right to counsel. We disagree. Statements voluntarily made to officers after this right of counsel has been invoked, when not solicited by “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response” do not violate defendant’s right to counsel. *State v. Leak*, 90 N.C. App. 351, 356, 368 S.E.2d 430, 433 (1988) (holding admissible statements voluntarily made by defendant after he invoked his right to an attorney) (quoting *Rhode Island v. Ignis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980)); *State v. Chapman*, 343 N.C. 495, 500, 471 S.E.2d 354, 357 (1996) (An officer’s “offers of reward, or inducements to the defendant to make a statement” are circumstances indicating confession is involuntary).

In this case the evidence presented by defendant tended to show that immediately after defendant asked for an attorney he was placed in handcuffs and taken to jail and told by Detective Lynn that the detective would speak to the magistrate on behalf of defendant. There was no evidence presented that the detective’s statement that he would talk to the magistrate contained a promise to defendant to free him or otherwise lessen his punishment in exchange for any statement by defendant. Nor is the detective’s handcuffing of defendant the type of conduct reasonably likely to elicit a response from defendant, but rather it is the type of conduct which occurs regularly in the daily practice of law enforcement. We thus find no merit to this argument.

We do not address defendant’s final argument as it is waived pursuant to Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure as defendant did not timely object to the instruction at trial.

No error in part; remanded for resentencing.

Judges COZORT and MARTIN, John C., concur.

Judge COZORT concurred in this opinion prior to his resignation 31 July 1997.

WILMOTH v. STATE FARM MUT. AUTO INS. CO.

[127 N.C. App. 260 (1997)]

TAMMY A. WILMOTH AND JEFFREY WILMOTH, PLAINTIFFS v. STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY, INC., DEFENDANT

No. COA96-734

(Filed 19 August 1997)

Insurance § 535 (NCI4th)— underinsured motorists coverage—settlement with tortfeasor prior to litigation—12(b)(6) dismissal—error

The trial court erred in dismissing plaintiff's claim under N.C.G.S. § 1A-1, Rule 12(b)(6) in an action to recover underinsured motorist (UIM) benefits by an insured who settled with the tortfeasor prior to initiating litigation while reserving the right to seek UIM coverage from the insured's carrier. Although defendant contends that under *Grimsley v. Nelson*, 342 N.C. 542, no direct action may be brought against the UIM carrier prior to entry of a judgment against a tortfeasor and that this claim was settled without entry of judgment, *Grimsley* directed that a UIM carrier be bound by a final judgment but does not state that judgment is the exclusive means which triggers the obligation of the UIM insurer to provide coverage. To the extent that the terms of defendant's policy might be construed to bar direct action against it to enforce the terms of a settlement agreement reached in compliance with N.C.G.S. § 20-279.21(b)(4) prior to bringing legal action, such terms are contrary to the legislative intent embodied in that statute and the Financial Responsibility Act must prevail.

Appeal by plaintiff from orders entered 14 March 1996 and 19 April 1996 by Judge Ronald L. Stephens in Durham County Superior Court. Heard in the Court of Appeals 18 March 1997.

Thompson & Smyth, L.L.P. by Theodore B. Smyth and Law Office of Charles Darsie, by Charles Darsie, for plaintiffs-appellants.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by John R. Kincaid, Robert E. Levin and George W. Miller, Jr., for defendant-appellee.

JOHN, Judge.

Plaintiffs appeal the trial court's dismissal pursuant to N.C.R. Civ. P. 12(b)(6) of their claim against defendant State Farm Mutual

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Automobile Insurance Company, Inc., for underinsured motorist (UIM) benefits. We reverse the trial court.

Pertinent allegations by plaintiffs and procedural background are as follows: On 9 June 1992, plaintiff Tammy A. Wilmoth (Wilmoth) suffered severe and permanent injuries in a collision between a 1987 Nissan Maxima vehicle owned and operated by Wilmoth and a vehicle owned and driven by James Edward Hunter (Hunter). Hunter was a named insured on a policy issued by Aetna Life and Casualty Insurance Co. (Aetna) affording automobile liability coverage of \$25,000.00 per person. Wilmoth was a named insured under an automobile liability policy issued by defendant which provided UIM coverage of \$50,000.00 per person. At the time of the collision, Wilmoth was married to plaintiff Jeffrey Wilmoth (Jeffrey). She also was a relative and resident of the household of Louis B. Wilmoth, Jr., whose automobile insurance policy with defendant also included UIM coverage.

Aetna tendered \$25,000.00, representing exhaustion of its coverage, in settlement of Wilmoth's claims against Hunter. On 23 August 1994 and 14 September 1994, plaintiffs notified defendant by certified mail of its opportunity to advance the \$25,000.00 tendered by Aetna in order to preserve its rights under N.C.G.S. § 20-279.21(b)(4) (1993). Defendant failed to advance the \$25,000.00, and plaintiffs accepted Aetna's settlement 3 October 1994, specifically "reserv[ing] all rights against State Farm Mutual Automobile Insurance Company under any applicable underinsured coverages."

On 26 April 1995, plaintiffs filed the instant action seeking to recover proceeds under the UIM policies issued by defendant. Defendant's 5 July 1995 motion to dismiss pursuant to N.C.R. Civ. P. 12 (b)(6) was allowed by order of the trial court entered 14 March 1996. Plaintiffs' 25 March 1996 motion to reconsider pursuant to N.C.R. Civ. P. 59 and 60 was denied 19 April 1996. Plaintiffs appeal both the 14 March and the 19 April 1996 orders.

A pleading may be dismissed under Rule 12(b)(6) if it fails to allege a sufficient legal or factual basis for the claim, or reveals a fact which necessarily defeats the claim. *State of Tennessee v. Environmental Management Comm.*, 78 N.C. App. 763, 765, 338 S.E.2d 781, 782 (1986). However, a complaint should not be dismissed for failure to state a claim upon which relief can be granted unless it discloses on its face an insurmountable bar to recovery, or it appears beyond doubt that the plaintiff can prove no set of facts supporting

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the claim that would entitle it to relief. *F.D.I.C. v. Loft Apartments*, 39 N.C. App. 473, 475, 250 S.E.2d 693, 694, *disc. review denied*, 297 N.C. 176, 254 S.E.2d 39 (1979).

UIM coverage is governed by the Financial Responsibility Act (the Act), *see* N.C.G.S. § 20-279.1 *et seq.* (1993), and the provisions of the Act are written into every automobile liability policy as a matter of law, *Ohio Casualty Ins. Co. v. Anderson*, 59 N.C. App. 621, 622, 298 S.E.2d 56, 57 (1982), *cert. denied*, 307 N.C. 698, 301 S.E.2d 101 (1983). Moreover,

[t]he avowed purpose of the Financial Responsibility Act, of which N.C.G.S. § 20-279.21(b)(4) is a part, is to compensate the innocent victims of financially irresponsible motorists.

Sutton v. Aetna Casualty & Surety Co., 325 N.C. 259, 265, 382 S.E.2d 759, 763, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989) (citation omitted). The Act is to be liberally construed so that its intended purpose may be accomplished. *Id.* If there is a conflict between the Act and the language of the policy, the Act prevails. *Id.* at 263, 382 S.E.2d at 762.

Defendant contends the complaint on its face reflects a bar to the instant action. Citing *Grimsley v. Nelson*, 342 N.C. 542, 467 S.E.2d 92, *reh'g denied*, 343 N.C. 128, 468 S.E.2d 774 (1996), defendant argues no direct action may be brought “against the underinsured motorist carrier prior to entry of a judgment against a tortfeasor.” *See generally* Kristen P. Sosnosky, *Survey, Reconciling North Carolina’s Interpretation of “Legally Entitled to Recover” with the Spirit of the Uninsured Motorist Statute: The Lessons of Grimsley v. Nelson*, 73 N.C. L. Rev. 2474 (1995). Because the complaint reveals plaintiffs’ claim against Hunter was settled without entry of judgment, defendant continues, no suit may be brought against defendant in that its liability was derivative of that of Hunter. Therefore, concludes defendant, the trial court properly dismissed plaintiffs’ complaint in that it set forth facts which operated to defeat plaintiffs’ claim against defendant. *See Tennessee v. Environmental Management Comm.*, 78 N.C. App. at 765, 338 S.E.2d at 782. We are not persuaded by defendant’s contentions.

In *Grimsley*, our Supreme Court held that

the language of N.C.G.S. § 20-279.21(b)(3)a, which provides that all insurance policies in the State will be deemed to include a pro-

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vision that “the insurer shall be bound by a *final judgment* taken by the insured against an uninsured motorist[.]”

342 N.C. at 548, 467 S.E.2d at 96. However, the case *sub judice* is distinguishable. In *Grimsley*, the issue before the Court was whether an action against unnamed defendant UIM carrier might continue after the plaintiff’s claim against the tortfeasor had been dismissed for insufficient service of process. *Id.* at 543-44, 467 S.E.2d at 93-94. The Court concluded that dismissal of the plaintiff’s cause of action against the tortfeasor barred the plaintiff’s claim against the UIM insurer as unnamed defendant. *Id.* at 548, 467 S.E.2d at 96.

However, the question before us is whether an action against the UIM carrier is barred by *settlement* with the tortfeasor without suit and within the statutory period. While *Grimsley* directs that an UIM carrier “shall be bound by a final judgment taken by [its] insured against an uninsured motorist,” *id.* (citation omitted), it does not state that judgment is the exclusive means which triggers the obligation of the UIM insurer to provide coverage.

By contrast, G.S. § 20-279.21(b)(4) declares that

[u]nderinsured motorist coverage is deemed to apply when, by reason of payment of judgment *or settlement*, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted.

G.S. § 20-279.21(b)(4) (emphasis added). In addition, the section provides that

[n]o insurer shall exercise any right of subrogation or any right to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a policy providing coverage against an underinsured motorist where the insurer has been provided with written notice before a *settlement* between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice.

G.S. § 20-279.21(b)(4) (emphasis added).

In *N.C. Farm Bureau, Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 483 S.E.2d 452 (1997), this Court held an insured’s limited settlement with the tortfeasor and liability insurer agreeing not to enforce any subse-

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quent judgment against the tortfeasor did not bar recovery of UIM benefits when the UIM carrier had been notified pursuant to the above section and took no action. *Id.* at 46-47, 483 S.E.2d at 455-56; compare *Spivey v. Lowrey*, 116 N.C. App. 124, 125, 446 S.E.2d 835, 836, *disc. review denied*, 338 N.C. 312, 452 S.E.2d 312 (1994) (general release of "all other persons, firms [and] corporations" bar to recovery against UIM carrier). In *Bost*, we noted the insurer failed to preserve its right to "approve" the settlement as provided by G.S. § 20-279.21(b)(4) and reasoned that

[b]ecause [plaintiff] exhausted the limits of liability by settling with [the tortfeasor's liability carrier], [plaintiff's UIM carrier], therefore, has no right to object to the settlement of the primary claim and cannot complain when the insured takes steps necessary to seek UIM coverage.

Bost, 126 N.C. App. at 48, 483 S.E.2d at 457; see also *Gurganious v. Integon General Ins. Corp.*, 108 N.C. App. 163, 423 S.E.2d 317 (1992), *disc. review denied*, 333 N.C. 538, 429 S.E.2d 558 (1993) (voluntary dismissal with prejudice of tortfeasor did not preclude recovery from plaintiff's UIM carrier when latter failed to preserve its rights in manner prescribed by G.S. § 20-279.21(b)(4)).

Similarly, defendant herein was notified pursuant to the section of plaintiffs' settlement with Hunter and Aetna and failed to preserve its right of subrogation. Plaintiffs subsequently accepted the tendered settlement while reserving their right to pursue UIM coverage from defendant. Defendant cannot now "complain" of plaintiffs' efforts to seek UIM coverage. *Bost*, 126 N.C. App. at 48, 483 S.E.2d at 457.

Our holding is consistent with the policy to construe the Act liberally in order to compensate innocent victims injured by financially irresponsible motorists. See *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763. Were an UIM carrier permitted to waive its subrogation rights against a tortfeasor while its insured remained barred, by virtue of settlement with the tortfeasor without legal action, from proceeding in a direct action against the carrier on grounds the insured "was not legally entitled to recover," the UIM carrier would be in a position to thwart its insured's legitimate efforts to seek coverage contractually agreed upon.

We also observe this Court has previously ruled an UIM insurer is not released from coverage when its insured and the tortfeasor reach

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settlement following filing of suit, but prior to entry of judgment. *Gurganious*, 108 N.C. App. at 165, 423 S.E.2d at 318 (insured's claim against UIM carrier not barred by settlement between insured and tortfeasor under which insured's complaint against latter was dismissed with prejudice). To conclude that a different result should ensue upon settlement reached prior to litigation would be to distinguish between types of settlement agreements without any such distinction appearing in G.S. § 20-279.21(b)(4). In addition, such distinction would encourage the filing of litigation even when the parties have agreed to a settlement. Our General Assembly, cognizant of the crushing burden of heavy caseloads placed upon our courts and the resultant operating costs, could not have intended such an absurd result, *see Insurance Co. v. Chantos*, 293 N.C. 431, 440, 238 S.E.2d 597, 603 (1977) (“[c]ourt[s] will, whenever possible, interpret a statute so as to avoid absurd consequences”), and we decline to impose it. *See Sutton*, 325 N.C. at 265, 382 S.E.2d at 763.

Finally, we note defendant repeatedly maintains that its policy requirement that plaintiffs be “legally entitled to recover” precludes any claim for UIM coverage because, notwithstanding the settlement agreement, plaintiffs “are not legally entitled to recover from anyone as no suit has ever been instituted nor any judgment entered.” To the extent the terms of defendant’s policy might be construed to bar direct action against it to enforce the terms of a settlement agreement reached in compliance with G.S. § 20-279.21(b)(4) prior to bringing legal action, such terms are contrary to the legislative intent embodied in G.S. § 20-279.21(b)(4) and the Act must prevail. *See Sutton*, 325 N.C. at 263, 382 S.E.2d at 762. We therefore hold the clause in defendant’s policy allowing the insured to bring action against defendant to enforce a claim the insured is “legally entitled to recover” applies to a claim for underinsured motorist coverage when the insured has complied with the notice requirements of G.S. § 20-279.21(b)(4) and, “by reason . . . of judgment or settlement,” G.S. § 20-279.21(b)(4), including agreement reached before action is filed, all liability coverage has been exhausted.

In sum, an insured who has settled with a tortfeasor prior to initiating litigation, while reserving the right to seek UIM coverage from the insured’s carrier, may initiate an action for such coverage directly against the carrier when the latter has received notice of the settlement in compliance with G.S. § 20-279.21(b)(4) and has waived its rights to approve the settlement. The trial court therefore erred in granting defendant’s motion to dismiss.

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As we have ruled in favor of plaintiff regarding the trial court's dismissal order of 14 March 1996, we do not discuss the court's 19 April 1996 order on plaintiff's purported motion to reconsider.

Reversed.

Judges EAGLES and COZORT concur.

Judge COZORT concurred prior to 31 July 1997.

CYNTHIA JO RYMER AND JOAN TRULL, PLAINTIFFS-APPELLEES v. ESTATE OF RALPH HENRY SORRELLS, JR., BY AND THROUGH THE COURT APPOINTED COLLECTOR, ELSON BRITT SORRELLS, DEFENDANT-APPELLANT

No. COA96-1210

(Filed 19 August 1997)

1. Judgments § 222 (NCI4th)— offensive collateral estoppel—mutuality—not required

North Carolina authorizes the non-mutual, offensive use of collateral estoppel. Mutuality of parties is no longer required when invoking either offensive or defensive collateral estoppel.

2. Judgments § 222 (NCI4th)— automobile accident—determination of last clear chance in prior action—offensive collateral estoppel—non-mutual party—doctrine erroneously applied

The trial court abused its discretion in an action arising from an automobile accident by allowing plaintiff Rymer to assert offensive collateral estoppel on the issue of last clear chance where plaintiff had been a passenger in a car driven by defendant's decedent and the jury in an prior action had found that the decedent had the last clear chance to avoid the accident, but the prior plaintiff had been the owner of the car and had been the front rather than the rear passenger in a two-door car. Plaintiff Rymer could have intervened in the prior action but did not, and defendant had no opportunity or incentive to raise these arguments. North Carolina courts are to strictly scrutinize whether to apply the doctrine of offensive collateral estoppel in light of judicial economy and fairness to the other party.

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[127 N.C. App. 266 (1997)]

Appeal by defendant from judgment entered 22 July 1996 by Judge J. Marlene Hyatt in Haywood County Superior Court. Heard in the Court of Appeals 15 May 1997.

Hylar & Lopez, P.A., by George B. Hylar, Jr., Michele M. Watson, and Robert J. Lopez, for plaintiffs-appellees.

Cogburn Goosmann Brazil & Rose, P.A., by Steven D. Cogburn, for defendant-appellant.

WYNN, Judge.

The facts of this case arise from the same accident addressed by our decision of *Trantham v. Estate of Sorrells*, 121 N.C. App. 611, 468 S.E.2d 401 (1996), *disc. review denied*, 343 N.C. 311, 472 S.E.2d 82 (1996):

On 26 January 1991, . . . Tina Trantham visited a bar in Haywood County where she met Cynthia Rymer and agreed to spend the night at her house. They rode together in Ms. Rymer's car which was driven by defendant-decedent, Ralph Henry Sorrells. Ms. Rymer had asked him to drive because she had consumed too much alcohol and Mr. Sorrells had represented that he had consumed only two beers.

Ms. Rymer rode in the front passenger seat, and Ms. Trantham and a male friend of Mr. Sorrells' rode in the back seat. During the course of the drive from Waynesville towards Canton on Interstate 40, Mr. Sorrells drove at a dangerously high rate of speed despite repeated protests and requests by Ms. Rymer and Ms. Trantham for him to slow down. He eventually stopped the car at a convenience store near Clyde, North Carolina where all of the occupants got out and entered the store. After assuring Ms. Rymer that he would drive slower, Mr. Sorrells continued driving the car. Nevertheless, he resumed driving at an excessively high speed again over the protests of Ms. Rymer and Ms. Trantham. Tragically, after turning onto North Canton Road, Mr. Sorrells drove the car into a wall on the roadside causing it to careen into a tree killing him and severely injuring Ms. Trantham and the other passengers.

Id. at 612, 468 S.E.2d at 402.

In *Trantham*, a jury found Mr. Sorrells negligent and grossly negligent, Tina Trantham contributorily negligent and grossly con-

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tributorily negligent, but awarded Ms. Trantham \$25,000 after finding that Mr. Sorrells had the last clear chance to avoid the accident. This court upheld the submission of the issue of last clear chance to the jury and affirmed the trial court's decision. *Trantham*, 121 N.C. App. at 612, 468 S.E.2d at 402.

The instant case involves a suit brought against Mr. Sorrells' estate by the front seat passenger-owner Cynthia Jo Rymer. Prior to trial, the trial court granted partial summary judgment in favor of Ms. Rymer on the issue of liability on the grounds that the *Trantham* judgment operated as collateral estoppel on the issues of Mr. Sorrells' negligence, gross negligence and last clear chance. Following a hearing on the issue of damages, the trial court entered judgment for Ms. Rymer in the amount of \$25,000 plus costs. The Estate of Sorrells appealed to this Court.

This case presents two issues on appeal: (I) Does North Carolina authorize the non-mutual, offensive use of collateral estoppel; and (II) If so, did the trial court abuse its discretion in applying it in this case. We find that our state does authorize the non-mutual, offensive use of collateral estoppel but conclude that it would be inequitable to allow Ms. Rymer to assert it in this case. We, therefore, reverse and remand the judgment of the trial court.

I.

[1] "Collateral estoppel precludes relitigation of an issue decided previously in judicial or administrative proceedings provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in an earlier proceeding." *In re McNallen*, 62 F.3d 619, 624 (4th Cir. 1995). *See also King v. Grindstaff*, 284 N.C. 348, 358, 200 S.E.2d 799, 806 (1973).

Until recently, our courts limited the application of collateral estoppel to parties or those in privity with them by requiring "mutuality": both parties had to be bound by the earlier judgment. *King v. Grindstaff*, 284 N.C. at 357, 200 S.E.2d at 805. However, in 1986, our Supreme Court, recognizing that "[t]he modern trend in both federal and state courts is to abandon the requirement of mutuality for collateral estoppel," eliminated the mutuality requirement for *defensive* collateral estoppel. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 432, 349 S.E.2d 552, 558 (1986) (non-mutual, defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated

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unsuccessfully in another action against a different party. See *Parklane Hosiery Company v. Shore*, 439 U.S. 322, 326, 58 L.Ed. 2d 552, 559 (1979)).

In the subject case, Ms. Rymer was not a party to the *Trantham* litigation, but she seeks to use the *Trantham* judgment against the Estate of Sorrells, which was a party in *Trantham*. This is known as non-mutual, offensive collateral estoppel: a plaintiff seeks to foreclose a defendant from relitigating an issue that the defendant has previously litigated unsuccessfully in another action against a different party. See *Parklane*, *supra*. In principle, this Court in *Tar Landing Villas v. Town of Atlantic Beach*, 64 N.C. App. 239, 307 S.E.2d 181 (1983), *disc. rev. denied*, 310 N.C. 156, 311 S.E.2d 296 (1984), approved of the use of non-mutual, offensive collateral estoppel even though we chose not to apply it in that case. Writing for the Court, Judge Wells stated:

While we recognize these exceptions [regarding mutuality and offensive application] and approve of the expanded doctrine as a way to end vexatious litigation, we, nevertheless, find that it would be inequitable to allow petitioners, even those with privity, to assert the doctrine in this case."

Id. at 243, 307 S.E.2d at 185.

Again, we reiterate Judge Wells' recognition of the modern trend and conclude that mutuality of parties is no longer required when invoking either offensive or defensive collateral estoppel.

II.

[2] Having determined that our law allows a non-mutual party to assert offensive collateral estoppel, we next consider whether it would be inequitable to allow Ms. Rymer to do so under the facts of this case.

In *Parklane*, the United States Supreme Court expressed its reservations regarding the application of non-mutual, offensive collateral estoppel in federal cases:

[O]ffensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does. Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely "switching adversaries." Thus defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive

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use of collateral estoppel, on the other hand, creates precisely the opposite incentive. Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. Thus offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action.

439 U.S. at 329-30, 58 L.Ed.2d at 561.

The Supreme Court also noted that offensive use of collateral estoppel might be unfair to a defendant if, among other things: (1) the defendant had little incentive to defend vigorously in the first action; (2) the judgment relied upon as the basis for the estoppel is inconsistent with previous judgments; and (3) the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result. *Id.* at 330-31, 58 L.Ed.2d at 561-62. In light of these considerations, the Supreme Court cautioned that non-mutual, offensive collateral estoppel should not be applied where: (1) a plaintiff in the second action could have easily joined in the earlier suit; or (2) where the application of offensive estoppel would be unfair to a defendant. *Id.* at 331, 58 L.Ed.2d at 562.

In *Tar Landing*, this court elaborated on the *Parklane* analysis by cautioning North Carolina courts to "strictly scrutinize whether to apply the doctrine in light of judicial economy and fairness to the other party." 64 N.C. App. at 244, 307 S.E.2d at 185.

Upon reviewing the record in the instant case, we conclude that it would be inequitable to allow Ms. Rymer to use the *Trantham* judgment to her advantage. First, although not required to do so, Ms. Rymer could have intervened in the earlier *Trantham* action. (It should be noted that Ms. Trantham chose *not* to sue Ms. Rymer under either a theory of negligent entrustment or respondent superior.) Second, we find that it would be unfair to allow Ms. Rymer to use the *Trantham* jury's finding that Mr. Sorrells had the last clear chance to avoid the accident. In *Trantham v. Estate of Sorrells*, this Court noted that in order to obtain an instruction on the doctrine of last clear chance, Ms. Trantham had to show, among other things, that she was unable to avoid the harm placing her in helpless peril immediately before the accident. 121 N.C. App. at 614, 468 S.E.2d at 403. In

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concluding that Mr. Sorrells had the last clear chance to avoid the accident, the *Trantham* jury focused on whether *Ms. Trantham* was in helpless peril at the time immediately preceding the accident. However, unlike *Ms. Rymer*, *Ms. Trantham* sat in the backseat of a two-door car. Moreover, in addition to being a front seat passenger, *Ms. Rymer* owned the vehicle. We express no opinion on whether a second jury would be convinced by either of these arguments, but it is clear that defendant had no opportunity nor incentive to raise them in its suit against *Ms. Trantham*. Instead, we conclude that the trial court abused its discretion in prohibiting the Estate of Sorrells from relitigating the issue of last clear chance.

Since we hold that the trial court erroneously granted summary judgment for plaintiff on the issue of defendant's liability, it follows that the trial court's award of damages cannot stand. Accordingly, we reverse the trial court's order granting summary judgment in plaintiff's favor as well as the subsequent award of damages.

Reversed.

Judges LEWIS and MARTIN, John C., concur.

AUGUSTA B. CARTER, PLAINTIFF-APPELLEE v. FOOD LION, INC., DEFENDANT-APPELLANT

No. COA96-1349

(Filed 19 August 1997)

1. Negligence § 154 (NCI4th)— slip and fall in grocery store—judgment notwithstanding verdict—properly denied

The trial court properly denied defendant's motion for a directed verdict and a judgment notwithstanding the verdict in a negligence action which resulted from plaintiff's slip and fall on vegetable material in one of defendant's retail grocery stores where a trier of fact could have concluded that defendant knew or should have known of the presence of the vegetable material due to the dirty conditions of the floor; that defendant failed to warn of its presence; and that plaintiff suffered injuries as a result of the fall.

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2. Evidence and Witnesses § 2403 (NCI4th)— slip and fall in grocery store—testimony of grocery store employee—motion in limine to exclude—denied—notice

In an action against defendant for negligently causing plaintiff's injuries when he slipped and fell in one of defendant's grocery stores, the trial court did not abuse its discretion in denying defendant's motion *in limine* to exclude the testimony of a witness where the defendant had notice that plaintiff would call the witness since the witness's name was originally provided to plaintiff by defendant through its employee list and plaintiff had provided defendant with a draft of the witness's statement in opposition to a summary judgment motion.

Appeal by defendant from judgment entered 4 September 1996 by Judge Forrest A. Ferrell in Catawba County Superior Court. Heard in the Court of Appeals 4 June 1997.

Waddell Mullinax Childs & Williams, by Richard A. Williams, Jr., for plaintiff-appellee.

Poyner & Spruill, L.L.P., by Douglas M. Martin and S. Mujeeb Shah-Khan, for defendant-appellant.

WALKER, Judge.

Plaintiff's evidence tended to show the following: On 26 February 1994, defendant operated a retail grocery store in Maiden, North Carolina, where plaintiff was a regular customer. About 7:00 p.m. on this date, plaintiff arrived at the store to purchase certain items. After making his selections, he paid the clerk, picked up his bag containing several items and proceeded to exit the store. As he approached the automatic doors, plaintiff slipped and fell. His feet went forward toward the doors and his right leg was pinned underneath him. As a result of the fall, plaintiff sustained a fracture of the right leg.

An inspection of the area where plaintiff fell revealed a piece of green vegetable material which was preceded by a green streak on the floor near the automatic doors. The parties stipulated at trial that this green vegetable material caused plaintiff to slip and fall.

Scott Baxter, a Food Lion employee, testified that when he arrived plaintiff was lying on the floor and that he noticed "there was something on the floor close to him [plaintiff] green, greens,

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lettuce . . .” which had a “streak where it had been.” In describing the floor area between the checkout counter and the doorway, Baxter testified:

[I]t appeared . . . like somebody left their receipts here and there, maybe a coupon or two. But from there forward, from what I could see of the floor, it appeared that—I remember seeing tracks from where a buggy had went through produce and got into some water over there. It didn’t appear that the floor was as clean as it should have been at the time, considering it was a Saturday and there was a lot of people coming in and out. It was a custom we keep the front end very clean. . . . It is the most dangerous for accidents to occur.

When plaintiff’s wife arrived he was still on the floor. She observed a green streak between where he lay and the checkout counter and she remembered she “kicked pieces of paper out of [her] way” as she approached the assistant manager at the checkout counter. Lewis Campbell, the store manager on duty, testified that he had inspected the front of the store after returning from his supper break about 6:00 p.m. He stated that the condition of the floor was not unusual and that it was the general practice to patrol the store every 2 to 3 hours or as needed. However, an accident report prepared by Campbell just after the incident stated that the area had been cleaned and inspected within the hour before the fall. The report also noted that the area was not clean because of the vegetable material on the floor.

Defendant’s motions for a directed verdict were denied and the jury awarded plaintiff the sum of \$33,000.00 in damages. Defendant contends the trial court erred in denying its motions for a directed verdict and judgment notwithstanding the verdict (JNOV).

[1] In ruling on a motion for a directed verdict, the trial court must consider the evidence in the light most favorable to the non-moving party, giving it the benefit of all reasonable inferences to be drawn therefrom, and resolving all conflicts in the evidence in its favor. *Smith v. Price*, 315 N.C. 523, 527, 340 S.E.2d 408, 411 (1986). A motion for JNOV pursuant to Rule 50(b)(1) is essentially a renewal of an earlier motion for a directed verdict. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337 (1985). Thus, the test for determining the sufficiency of the evidence when ruling on a motion for JNOV is identical to that applied when ruling on a motion for a directed verdict. *Summey v. Cauthen*, 283 N.C. 640,

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647, 197 S.E.2d 549, 554 (1973). The burden carried by the movant is particularly significant in cases in which the principal issue is negligence. Only in exceptional cases is it appropriate to enter a directed verdict against a plaintiff in a negligence case. *Cook v. Wake County Hosp. Sys., Inc.*, 125 N.C. App. 618, 482 S.E.2d 546, 548 (1997). In negligence cases, summary adjudication is normally inappropriate due to the fact that the test of the reasonably prudent person is one which the jury must apply in deciding the questions at issue. *Id.* at —, 482 S.E.2d at 549.

In order to survive a motion for JNOV, plaintiff must present evidence setting forth a *prima facie* case of negligence, *i.e.* plaintiff must forecast evidence to show that defendant owed plaintiff a duty of care, that defendant's actions or failure to act breached that duty, that the breach was the actual and proximate cause of the injury to plaintiff, and that damages resulted from the injury. *Lamm v. Bissette Realty*, 327 N.C. 412, 416, 395 S.E.2d 112, 115 (1990).

Plaintiff was an invitee on the premises of defendant by virtue of his status as a customer. *Crane v. Caldwell*, 113 N.C. App. 362, 365, 438 S.E.2d 449, 451 (1994). Because plaintiff was an invitee, the store had a duty to keep the floors and passageways in a reasonably safe condition for invitees entering or leaving the premises and to warn of any hidden dangers about which defendant knew or, in the exercise of reasonable care, should have known. *Lamm*, 327 N.C. at 416, 395 S.E.2d at 115.

An invitee may not recover unless he can show that the dangerous condition which caused his fall had existed for such a period of time that the defendant knew or by the exercise of reasonable care should have known of its existence and given warning. *Long v. Food Stores*, 262 N.C. 57, 60, 136 S.E.2d 275, 278 (1964). A proprietor is not the insurer of the safety of its customers. *Wrenn v. Convalescent Home*, 270 N.C. 447, 448, 154 S.E.2d 483, 484 (1967). *See also, Rone v. Byrd Food Stores*, 109 N.C. App. 666, 428 S.E.2d 284 (1993). Therefore, defendant's duty to plaintiff was that of " 'ordinary care to keep [its store] in a reasonably safe condition . . . and to give warning of hidden perils or unsafe conditions insofar as they could be ascertained by reasonable inspection and supervision.' " *Rone*, 109 N.C. App. at 669, 428 S.E.2d at 285-86, (*quoting Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 103 S.E.2d 281, 283 (1963)).

In order to hold the defendant liable, the plaintiff must show that defendant either negligently created the condition causing the injury

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or negligently failed to correct the condition after actual or constructive notice of its presence. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342-43 (1992). While not an insurer of its customers' safety, defendant is charged with knowledge of unsafe conditions of which it has notice and is under a duty of ordinary care to give warning of hidden dangers. *Rives v. Great Atlantic & Pacific Tea Co.*, 68 N.C. App. 594, 596, 315 S.E.2d 724, 726 (1984). Evidence that the condition (causing the fall) on the premises existed for some period of time prior to the fall can support a finding of constructive notice. *See Morgan v. Tea Co.*, 266 N.C. 221, 228, 145 S.E.2d 877, 883 (1966) (evidence that "vegetable leaf was mashed and bruised and that other debris was [on the floor]" supports submission of issue to jury on store owner's negligence); *Long v. Food Stores*, 262 N.C. 57, 61, 136 S.E.2d 275, 278-79 (1964) (evidence of grapes on the floor "full of lint and dirt" sufficient to show that owner had knowledge of their presence).

Here, plaintiff presented evidence that he slipped and fell on a piece of green vegetable material, that the floor was dirty with visible "buggy tracks," that receipts and coupons littered the area around the checkout counters between the counters and the automatic doors, and that defendant's accident report noted the floor appeared unclean due to the vegetable material which was present on the floor. Thus, plaintiff's evidence raised an inference of negligence that defendant failed to keep the floors inspected and cleared of debris. Where there exists a reasonable inference that a condition had existed for such a period of time as to impute constructive knowledge to the defendant proprietor of a dangerous or unsafe condition, it is a question for the jury to decide. *See Mizell v. K-Mart Corporation*, 103 N.C. App. 570, 406 S.E.2d 799 (1991). In *Kennedy v. K-Mart Corp.*, 84 N.C. App. 453, 352 S.E.2d 876 (1987), plaintiff customer fell on fingernail polish remover in the aisle of defendant's store. The evidence showed that no employees heard a bottle break or had knowledge of the spill. However, evidence of a broken bottle pushed against the shelf gave rise to the inference that the condition had existed for such a length of time as to impute knowledge to defendant and negligence was thus a question for the jury. *Id.* at 455, 352 S.E.2d at 878.

Viewing the evidence in the light most favorable to plaintiff, a reasonable trier of fact could conclude that defendant knew or should have known of the presence of the vegetable material due to the presence of paper and the dirty condition of the floor, that

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defendant failed to warn of its presence, and that as a result of the fall, plaintiff suffered injuries. Any inconsistencies in the evidence should be decided by the jury. We therefore conclude that the trial court properly denied defendant's motions for a directed verdict and JNOV.

[2] We next consider whether the trial court erred in denying defendant's *motion in limine* to exclude the testimony of Scott Baxter. Defendant contends the trial court erred when it allowed Scott Baxter to testify because plaintiff failed to supplement its answers to interrogatories regarding Baxter's knowledge of the events in question. Although defendant asserts that it was not made aware of Baxter as a potential witness, his name was originally provided to plaintiff by defendant through the submission of an employee list. Plaintiff's contention that this list was equally available to defendant was obviously persuasive with the trial court. Further, plaintiff had provided defendant with a draft of Baxter's statement in opposition to defendant's motion for summary judgment. This should have given defendant notice that plaintiff may call Baxter as a witness.

The ground for reversing a court's decision on a *motion in limine* is an abuse of discretion. *Power Co. v. Ham House, Inc.*, 43 N.C. App. 308, 311, 258 S.E.2d 815, 818 (1979) (trial court did not abuse its discretion in denying *motion in limine* which sought to keep from jury certain testimony concerning respondent's future plans for expansion). We therefore apply an abuse of discretion standard in reviewing the trial court's ruling. To give rise to abuse of discretion, the court's ruling must be so unreasonable under the facts of the case as to constitute reversible error. After careful review, we conclude that the trial court did not abuse its discretion in denying defendant's *motion in limine* to exclude Baxter's testimony.

No error.

Judges GREENE and JOHN concur.

ESTATE OF MULLIS v. MONROE OIL CO.

[127 N.C. App. 277 (1997)]

ESTATE OF JACQUELINE MELISSA MULLIS, BY KATHY DIXON, ADMINISTRATOR,
PLAINTIFF-APPELLANT V. MONROE OIL COMPANY, INCORPORATED, CITY OF
MONROE ALCOHOLIC BEVERAGE CONTROL, LISTON S. DARBY, ADMINISTRATOR
OF THE ESTATE OF DWAIN LYDELL DARBY, AND THE ESTATE OF OTIS STEPHEN BLOUNT,
DEFENDANTS-APPELLEES

No. COA96-1230

(Filed 19 August 1997)

**Intoxicating Liquor § 64 (NCI4th)— underage driver—alcohol
related accident—Dram Shop action not timely filed—
wrongful death action—summary judgment for defendant**

The trial court did not err in granting defendants' motion for summary judgment in a wrongful death action brought by the decedent's estate where the decedent was killed in an alcohol related accident in which an underage driver purchased alcohol from stores owned by defendants. Plaintiff failed to file a timely action pursuant to N.C.G.S. § 18B-120, the Dram Shop Act, and may not maintain a wrongful death action because the decedent had she lived could not have established an action for negligence *per se* or for common law negligence. The Dram Shop Act provided the sole cause of action available to plaintiff.

Appeal by plaintiff from order entered 10 May 1996 by Judge Jerry Cash Martin in Union County Superior Court. Heard in the Court of Appeals 15 May 1997.

Clark, Griffin & McCollum, L.L.P., by Joe P. McCollum, Jr. and William L. McGuirt, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Timothy G. Barber and Steven D. Gardner, for defendant-appellee Monroe Oil Company.

Morris, York, Williams, Surles & Brearley, by R. Gregory Lewis, and Jordan, Price, Wall, Gray & Jones, by Joseph E. Wall for defendant-appellee Monroe Alcoholic Beverage Control Board.

WYNN, Judge.

The facts of this appeal are set forth in greater detail in the companion case of *Estate of Darby v. Monroe Oil Co., Inc.*, 127 N.C. App. 301, 488 S.E.2d 828 (1997). The following facts are pertinent to this appeal: Shortly after midnight on 1 May 1993, Otis Stephen Blount

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drove a vehicle owned by the front seat passenger, Dwaine Darby, off the road and into a tree killing himself, Darby and the two backseat passengers, Melissa Mullis and Patty Teel. All were under the age of twenty one and the accident was caused by Blount's intoxication. Earlier that evening, Blount had twice purchased and consumed liquor from a store operated by defendant City of Monroe Alcoholic Beverage Control ("Monroe ABC") and beer from a convenience store owned by defendant Monroe Oil Company, Inc. ("Monroe Oil").

Unlike the plaintiff estate in *Estate of Darby*, for reasons not given in the record, the Estate of Melissa Mullis failed to file an action under N.C. Gen. Stat. § 18B-120 (1996) ("the Dram Shop Act") within the one year statute of limitations period. Having lost this opportunity to obtain relief under the Dram Shop Act, the administrator of Melissa Mullis' estate brought a wrongful death action alleging that Monroe Oil and Monroe ABC negligently sold alcoholic beverages to an underage person in violation of N.C. Gen. Stat. § 18B-102 (1996) (prohibiting the unlawful manufacture, sale, etc. of alcohol) and N.C. Gen. Stat. § 18B-302 (1996) (prohibiting the sale of alcohol to underage persons). Following discovery, Monroe Oil and Monroe ABC moved for and the trial court granted summary judgment. From that judgment, the Estate of Mullis appealed to this Court.

We confront in this appeal the novel question of whether a plaintiff may maintain a wrongful death action against a vendor on the basis of the vendor's unlawful sale of alcohol to an underage person in violation of N.C.G.S. § 18B-102 in general, and more specifically, N.C.G.S. § 18B-302.

The plaintiff, Estate of Mullis, in this case, argues that in addition to the cause of action provided by the Dram Shop Act, a cause of action may be maintained under the wrongful death statute against vendors who unlawfully sell alcohol to underage persons who as a result of their intoxication from the consumption of alcohol injures or kills others. In response, the vendors in this case, Monroe Oil and Monroe ABC, contend that the Dram Shop Act provides the exclusive remedy for Estate of Mullis. Alternatively, they argue that Melissa Mullis' contributory negligence bars, as a matter of law, any potential wrongful death action.

For the reasons given below, we interpret our Supreme Court's decision in *Hart v. Ivey*, 332 N.C. 299, 420 S.E.2d 174, (1992), to compel a finding that the Estate of Mullis may not maintain an action under the wrongful death statute in this case.

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In *Carver v. Carver*, 310 N.C. 669, 673, 314 S.E.2d 739, 742 (1984), our Supreme Court noted:

[I]n determining whether any wrongful death action is maintainable, this Court has consistently analyzed the question in terms of whether the deceased had he lived would have had a claim against defendant for injuries inflicted. If so, then the estate of the deceased may maintain an action for wrongful death; if not, then the action for wrongful death will not lie.

Thus, to maintain a wrongful death action against the vendors in the instant case, the Estate of Mullis must show that the deceased, Melissa Mullis, would have had a claim against Monroe Oil and Monroe ABC had she lived. We conclude that had Melissa Mullis lived, she could have maintained neither a negligence *per se* cause of action based on a violation of N.C.G.S. § 18B-302, nor an action under common law negligence based on the selling of alcohol to underage persons in violation of N.C.G.S. § 18B-102.

First, had Melissa Mullis lived, she could not have established that a violation of N.C.G.S. § 18B-302 was negligence *per se*. The Estate of Mullis argues that the vendors' alleged violation of N.C.G.S. § 18B-302—making it unlawful to sell or give alcoholic beverages to persons under twenty-one years of age—constitutes negligence *per se*. However, in *Hart v. Ivey*, our Supreme Court, after determining that this statute was not a public safety statute, held that “a violation of N.C.G.S. § 18B-302 is not negligence *per se*.” 332 N.C. at 304, 420 S.E.2d at 177. The Court explained that the purpose of this statute was not to protect the driving public from intoxicated drivers, rather it was to restrict the consumption of alcohol by minors. *Id.* Thus, Melissa Mullis could not have established that the vendors' violation of N.C.G.S. § 18B-302 constituted negligence *per se*.

Second, had Melissa Mullis lived, she could not have established a common law negligence action. To establish a *prima facie* case of common law negligence, a plaintiff must show:

- (1) that defendants had a duty or obligation recognized by the law, requiring them to conform to a certain standard of conduct, for the protection of others against unreasonable risks;
- (2) a failure on defendants' part to conform to the standard required;

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(3) a reasonably close causal connection between defendants' conduct and plaintiffs' injuries; and

(4) actual loss or damage.

Freeman v. Finney and Zwigard v. Mobil Oil Corp., 65 N.C. App. 526, 528, 309 S.E.2d 531, 533, *disc. review denied*, 310 N.C. 744, 315 S.E.2d 702 (1984). "Our courts to date have not articulated any common law duty existing between a third-party furnishing alcohol to underage persons and the public at large." *Hart v. Ivey*, 102 N.C. App. 583, 594, 403 S.E.2d 914, 921, *aff'd on other grounds*, 332 N.C. 299, 420 S.E.2d 174 (1992). Moreover, in *Hutchens v. Hankins*, 63 N.C. App. 1, 5, 303 S.E.2d 584, 587, *disc. review denied*, 309 N.C. 191, 305 S.E.2d 734 (1983), this Court observed that "[u]nder the common law rule it was not a tort to either sell or give intoxicating liquor to ordinary able-bodied men, and no cause of action existed against one furnishing liquor in favor of those injured by the intoxication of the person so furnished."

Concerning the existence of a duty under common law negligence to the general public, we find it significant in this case that unlike the plaintiffs in *Hart* and *Hutchens*,¹ the Estate of Mullis did not allege that the vendors furnished the alcohol to Blount with either actual or constructive knowledge that he was intoxicated.

In *Hart*, the plaintiffs alleged facts sufficient to support a claim of actionable common law negligence in that "the defendants served an alcoholic beverage to a person they knew or should have known was under the influence of alcohol and that the defendants knew that the person who was under the influence of alcohol would shortly thereafter drive an automobile." 332 N.C. at 305, 420 S.E.2d at 178. Writing for the Court, Justice Webb concluded that "[t]he defendants were under a duty to the people who travel on the public highways not to serve alcohol to an *intoxicated* individual who was known to be driving." *Id.* (emphasis supplied.); *see also*, *Hutchens*, 63 N.C. App. at 2, 303 S.E.2d at 586. "[A] licensed provider of alcoholic beverages for on-premises consumption may be held liable for injuries or damages proximately resulting from the acts of persons to whom beverages were illegally furnished while intoxicated.")

1. The common law actions found in *Hart* and *Hutchens* were premised on the provision of alcohol to intoxicated persons which is prohibited by N.C. Gen. Stat. 18B-305 (formerly § 18B-34)—a *per se* negligence statute. *See Hart* 332 N.C. at 304, 420 S.E.2d at 177. While both cases turned on the dispute to find that the common law supported an action of negligence against the alcohol providers, the determination that

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In sum, we conclude that the Dram Shop Act provided the sole cause of action available to the Estate of Mullis.² Having failed to timely file an action under that statute, the Estate of Mullis cannot obtain relief under the wrongful death statute because Melissa Mullis could not have maintained an action against defendants either under a theory of negligence *per se* or common law negligence, had she lived. Therefore, the trial court's grant of summary judgment for defendants must be,

Affirmed.

Judges LEWIS and MARTIN, John C., concur.

BERNICE A. BRILEY, INDIVIDUALLY AND NED H. BRILEY, AS SPOUSE, PLAINTIFFS V.
WILLIAM S. FARABOW AND HIGH POINT OB-GYN ASSOCIATES, INC., DEFENDANTS

No. COA96-1118

(Filed 19 August 1997)

**Judgments § 431 (NCI4th)— summary judgment—Rule 60
motion for relief—neglect of attorneys—imputed to
client—error**

The trial court erred in a medical malpractice action by denying plaintiffs' motion for relief based on excusable neglect pursuant to N.C.R. Civ. P. 60(b)(1) where the trial court improperly imputed plaintiffs' attorneys' neglect to plaintiffs and improperly failed to address whether plaintiffs' behavior was excusable or inexcusable.

Appeal by plaintiffs from order entered 9 May 1996 and from order entered 24 October 1996 by Judge Howard R. Greenson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 19 May 1997.

the statute is a safety statute indicates that it was designed to protect the general public and thus, a duty was owed by the alcohol providers to the general public not to provide alcohol to intoxicated persons known to be driving. As noted earlier, violation of the statute in the subject case, 18B-302, does not constitute *per se* negligence.

2. Since the Dram Shop Act is not at issue, we do not address the issues of whether the deceased was contributorily negligent or "aided and abetted" in the purchase of the alcohol. *See, Darby*, 127 N.C. App. 301, — S.E.2d — (1997).

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[127 N.C. App. 281 (1997)]

Randolph M. James, P.C., by Randolph M. James, for plaintiff-appellants.

Elrod Lawing & Sharpless, P.A., by Sally A. Lawing, for defendant-appellees.

McGEE, Judge.

In August 1995, plaintiffs filed this medical malpractice action. In October 1995, a N.C.R. Civ. P. 26(f1) consent order was entered whereby plaintiffs were required to designate their expert witnesses on or before 30 November 1995. Plaintiffs failed to designate their expert witnesses by this date. On 15 February 1996, defendants designated their expert witnesses and moved for summary judgment with a supporting affidavit. In March 1996, plaintiffs' attorney filed "Plaintiffs' Expert Witness Designation" naming two medical experts and filed an affidavit by Bernice Briley incorporating an unverified letter report from Dr. Paul Gatewood. The summary judgment motion was continued from its original hearing date to a later date, and plaintiffs' attorneys agreed in writing that no additional affidavits would be filed in the interim period. On 11 March 1996, defendants filed a motion to strike plaintiffs' expert witness designation. A hearing was held on both motions at the 29 April 1996 session of Guilford County Superior Court, Judge Howard R. Greeson, Jr. presiding. In orders entered 9 May 1996, Judge Greeson granted defendants' motion to strike plaintiffs' expert designation of witnesses pursuant to N.C.R. Civ. P. 26(f1) and granted defendants' motion for summary judgment.

Plaintiffs filed a motion for relief from judgment pursuant to N.C.R. Civ. P. 60(b)(1). This motion was heard at the 7 October 1996 non-jury civil session of Guilford County Superior Court, Judge Howard B. Greeson presiding, and denied by the trial court in an order entered 24 October 1996. Plaintiffs filed notices of appeal from the order striking their expert witness designation and from the order denying their Rule 60(b)(1) motion.

The dispositive issue on appeal is whether the trial court acted under misapprehension of law in denying plaintiffs' N.C.R. Civ. 60(b)(1) motion for relief from judgment. We hold the trial court's error of law requires the order be vacated and the case remanded.

Plaintiffs moved for relief from judgment based on excusable neglect pursuant to N.C.R. Civ. P. 60(b)(1). A trial court's conclusion regarding excusable neglect is a conclusion of law which may be

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reviewed and reversed on appeal. *Dishman v. Dishman*, 37 N.C. App. 543, 547, 246 S.E.2d 819, 822 (1978). Although a trial court's findings are conclusive on appeal if supported by any competent evidence, findings made under misapprehension of law are not binding, and a Rule 60(b) order may be reversed if the findings are insufficient to support the legal conclusion. *Id.* When this occurs, the case must be remanded so that the trial court may consider the evidence in its true legal light. *Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E.2d 84, 87 (1949).

Plaintiffs contend the trial court improperly imputed their attorneys' neglect to them and improperly failed to address whether their behavior, rather than that of their attorneys, was excusable or inexcusable in denying their Rule 60(b)(1) motion. We agree. The neglect of a litigant's attorney will not be imputed to the litigant unless the litigant is guilty of inexcusable neglect. *Dishman*, 37 N.C. App. at 547, 246 S.E.2d at 823. The proper focus for the trial court is on "what may be reasonably expected of a party in paying proper attention to his case under all the surrounding circumstances." *Id.* at 547, 246 S.E.2d at 822. "When a litigant has not properly prosecuted his case because of some reliance on his counsel, the excusability of the neglect on which relief is granted is that of the litigant, not of the attorney." *Id.* at 547, 246 S.E.2d at 822-23. " 'The neglect of the attorney, although inexcusable, may still be cause for relief.' " *Norton v. Sawyer*, 30 N.C. App. 420, 423, 227 S.E.2d 148, 151 (quoting *Moore v. Deal*, 239 N.C. 224, 227, 79 S.E.2d 507, 510 (1954)), *disc. review denied*, 291 N.C. 176, 229 S.E.2d 689 (1976). A litigant "who employs counsel and communicates the merits of his case may reasonably rely on his counsel and counsel's negligence will not be imputed to him unless he has ample notice either of counsel's negligence or of a need for his own action." *Dishman*, 37 N.C. App. at 548, 246 S.E.2d at 823.

In its Rule 60(b)(1) order, the trial court made extensive findings regarding the neglect of plaintiffs' attorneys and found this neglect inexcusable. However, the court made no findings regarding whether plaintiffs' behavior was excusable or inexcusable. In addition, the court made the following pertinent findings of fact:

(14) . . . The Court finds that the failure to designate the experts was due to Ms. Young's [plaintiffs' attorney] unexcused negligence. . . .

(15) . . . Since the selection and designation of experts is obviously a matter to be handled by counsel, the Court finds as a fact

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that the unexcused neglect of counsel cannot be used to avoid enforcement of the rule's [N.C.R. Civ. P. 26(f1)] sanctions.

In its first conclusion of law, the court then ruled "The failure to designate expert witnesses as required by a Rule 26(f1) order, due to inexcusable neglect of counsel, does not constitute excusable neglect under Rule 60(b)(1)."

These findings of fact and conclusions of law indicate the trial court applied an incorrect legal standard effectively imputing plaintiffs' attorneys' neglect to plaintiffs without making any findings or conclusions regarding the level of care exercised by plaintiffs themselves in regard to their case. Instead, the court incorrectly focused on whether plaintiffs' attorneys' behavior was excusable or inexcusable. However, the relevant inquiry here is whether plaintiffs' behavior was excusable or inexcusable, not whether their attorneys' behavior was excusable or inexcusable. Since the trial court applied the incorrect legal standard, its findings do not support its conclusions of law and its conclusions of law are in error.

Defendants contend, however, that plaintiffs themselves committed inexcusable neglect by hiring an out-of-state attorney who was not licensed to practice law in North Carolina. Granted, our appellate courts have previously stated:

The standard of care required of the litigant is that which a man of ordinary prudence usually bestows on his important business.

The attorney employed, 'must be one licensed to practice in this State, and his negligence on which the prayer for relief is predicated must have been some failure in the performance of professional duties which occurred prior to and was the cause of the judgment sought to be vacated.'

Norton, 30 N.C. App. at 423, 227 S.E.2d at 151 (emphasis added) (citations omitted) (quoting *Moore*, 239 N.C. at 227, 79 S.E.2d at 510). We first note the trial court did not find or conclude that plaintiffs committed inexcusable neglect by hiring an out-of-state attorney. Furthermore, in addition to hiring an out-of-state attorney, plaintiffs also hired a licensed North Carolina attorney who acted as local counsel for their out-of-state attorney and who appeared at summary judgment on their behalf. Under the circumstances, the trial court's findings do not support the legal conclusion, advocated by defendants, that plaintiffs committed inexcusable neglect by hiring an attorney not licensed to practice law in this State.

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Defendants further contend that even if there was excusable neglect in plaintiffs' failure to timely designate their expert witnesses, this neglect did not cause entry of summary judgment against plaintiffs. On this issue the trial court made the following conclusion of law:

2. Even if the Court were to reverse its order striking plaintiff's [sic] tardy expert designation, plaintiffs would not be entitled to any relief from the order allowing defendants' motion for summary judgment because they would still have no competent evidence, as of May 1, 1996, to rebut defendants' properly supported motion. Thus, even if the Court were to find excusable neglect, plaintiffs would not be able to prevail on the record that existed on May 1, 1996, when the motion was heard.

"Excusable neglect is something which must have occurred at or before entry of the judgment, and which caused it to be entered." *Norton*, 30 N.C. App. at 424, 227 S.E.2d at 152. In its Rule 60(b)(1) order, the trial court makes excusable neglect findings and conclusions only in reference to plaintiffs' attorneys' failure to timely designate expert witnesses. However, at the Rule 60(b)(1) motion hearing, plaintiffs asserted their attorneys' failure to submit competent affidavits in opposition to defendants' summary judgment motion, as well as their failure to designate expert witnesses, was excusable neglect. Thus, the attorney neglect asserted by plaintiffs is much broader than just the failure to designate expert witnesses; it includes the attorneys' failure to present competent evidence at the summary judgment hearing.

The findings of the court in its Rule 60(b)(1) order stress that summary judgment was entered against plaintiffs because plaintiffs' attorneys' failed to timely file their expert witness designation and failed to submit competent evidence in opposition to defendants' summary judgment motion. In addition, the failure to timely designate expert witnesses resulted in the court's decision to preclude these witnesses from testifying at trial, which decision in turn logically resulted in entry of summary judgment against plaintiffs because plaintiffs could not prevail on their medical malpractice claims without expert testimony. The court's findings of fact and conclusions of law regarding excusable neglect are not adequate because they focus solely on the failure to designate expert witnesses and omit analysis of plaintiffs' attorneys' purported neglect in failing to present adequate and competent evidence at summary judgment.

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Of course, even if excusable neglect were properly found, the denial of plaintiffs' Rule 60(b) motion would still be correct if plaintiffs failed to plead a meritorious defense. *See Bank v. Finance Co.*, 25 N.C. App. 211, 212, 212 S.E.2d 552, 553 (1975). "[I]t is not necessary that a meritorious defense be proved, but only that a *prima facie* defense exists." *Wynnnewood Corp. v. Soderquist*, 27 N.C. App. 611, 615, 219 S.E.2d 787, 790-91 (1975). Here, since the trial court found no excusable neglect, it did not make findings as to whether plaintiffs had pled a meritorious claim and was not required to do so. *See Dishman*, 37 N.C. App. at 547, 246 S.E.2d at 822. Given this lack of findings, assessment of the merit of plaintiffs' claims is a matter for the trial court to resolve on remand. *See id.*

Of course, one of the material issues for the court's consideration on remand is whether entry of its N.C.R. Civ. P. 26(f1) order striking plaintiffs' designation of expert witnesses resulted from excusable neglect. In considering this issue, the trial court might also consider, in its discretion, whether a sanction against plaintiffs' attorneys under N.C.R. Civ. P. 26(g) would be more appropriate in this situation than a N.C.R. Civ. P. 26(f1) sanction against plaintiffs.

We vacate the Rule 60(b)(1) order and remand the case for a new hearing and order ruling on all material issues raised by plaintiffs' Rule 60(b)(1) motion. *See Hanford*, 230 N.C. at 233, 53 S.E.2d at 87; *York v. Taylor*, 79 N.C. App. 653, 655, 339 S.E.2d 830, 832 (1986).

Vacated and remanded.

Judges EAGLES and SMITH concur.

STATE OF NORTH CAROLINA v. MARK EDWARD FLY

No. COA96-1109

(Filed 19 August 1997)

**Obscenity, Pornography, Indecency, or Profanity § 25
(NCI4th)—indecent exposure—buttocks not private parts
under statute**

The trial court erred by denying defendant's motion to dismiss a prosecution for indecent exposure under N.C.G.S. § 14-190.9 in which defendant was charged with indecent expo-

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sure for exposing his buttocks. The statute prohibits wilfully exposing "private parts" and the Court of Appeals has held that "private parts" as used in N.C.G.S. § 14-190.9 refers to "genital organs." While the conduct engaged in by defendant is indecent as that term is generally defined, it is not within the province of the Court of Appeals to vary from the natural and ordinary meaning of words used by our legislature to define the criminal offense.

Judge WALKER dissenting.

Appeal by defendant from judgment dated 20 December 1995 by Judge William H. Helms in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 May 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Amy R. Gillespie, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Karen E. Eady, for defendant appellant.

GREENE, Judge.

Mark Edward Fly (defendant) appeals a jury verdict finding him guilty of indecent exposure.

On 26 July 1995 Mrs. Barbara Glover (Glover) was walking up the stairs to her condominium when defendant appeared on the landing three steps above her. He was wearing only a baseball hat and shorts, which were pulled down to his ankles. Defendant bent over, with his back to Glover, allowing Glover to view the "crack of his buttocks" and his "fanny." Defendant then ran away and escaped on his bicycle. The following morning Glover looked out the window of her condominium and saw defendant sitting on his bicycle looking toward her condominium. He was wearing the same baseball hat and shorts. Glover called 911 and defendant was arrested and charged with indecent exposure for unlawfully and wilfully exposing "the private parts of his person in a public place."

At trial defendant moved to dismiss the charge on the grounds that the evidence was insufficient to show each element of the crime charged. The motion was denied and a jury found defendant guilty of indecent exposure.

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The dispositive issue is whether “private parts” as that phrase is used in N.C. Gen. Stat. § 14-190.9 includes a person’s buttocks.

Section 14-190.9 makes it a Class 2 misdemeanor for any person to:

(a) [W]illfully expose the *private parts* of his or her person in any public place and in the presence of any other person or persons, of the opposite sex. . . .

N.C.G.S. § 14-190.9 (1993) (emphasis added).

Although the statute does not define “private parts,” this Court has previously held that “private parts,” as that phrase is used in section 14-190.9, refers to the “genital organs.” *State v. Jones*, 7 N.C. App. 166, 169, 171 S.E.2d 468, 469 (1970) (holding that the exposure of a woman’s breasts did not violate section 14-190.9 because they were not her private parts). Because a person’s buttocks are not “genital organs,” see *American Heritage College Dictionary* 568 (3d ed. 1993) (defining genital organs as those related to “biological reproduction”), it follows that the buttocks are not “private parts” within the meaning of section 14-190.9.¹ See John H. Snyder, *North Carolina Elements of Criminal Offenses* 207 (5th ed. 1994) (exposure of buttocks not a violation of indecent exposure statute).

We recognize that the conduct engaged in by the defendant in this case is indecent as that term is generally defined. See *American Heritage Dictionary* 653 (2d college ed. 1982) (indecent defined as “[o]ffensive to good taste”). It is not within the province of this Court, however, to vary from the natural and ordinary meaning of words

1. We note that the dissent relies on N.C. Gen. Stat. §§ 14-190.13 and -202.10 to “establish that our legislature intended to include buttocks as a ‘private part.’” Those statutes, however, are unrelated to the matter addressed in section 14-190.9 and thus are not appropriately used to establish the meaning of “private parts,” a phrase unique to section 14-190.9. See *Carver v. Carver*, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984) (only statutes applicable to the same matter are “construed together in order to ascertain legislative intent”). The enactment of sections 14-190.13 and -202.10, occurring subsequent to the enactment of section 14-190.9, does reveal, however, a deliberate choice by the legislature to avoid using the phrase “private parts” in the more recent statutes while retaining it in the earlier statute. Its retention in section 14-190.9 is particularly significant in the face of this Court’s decision in *Jones* because it reflects a satisfaction with that Court’s definition of “private parts” as a person’s “genital organs.” See *Anderson v. Baccus*, 109 N.C. App. 16, 22, 426 S.E.2d 105, 108 (1993) (“where [legislature] chooses not to amend a statutory provision that has been interpreted in a specific . . . way by our courts, we may assume that it is satisfied with that interpretation”), *aff’d in part and rev’d in part on other grounds*, 335 N.C. 526, 439 S.E.2d 136 (1994).

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used by our legislature to define the criminal offense.² *Harrison v. Guilford County*, 218 N.C. 718, 722, 12 S.E.2d 269, 272 (1940). It is the legislature that is to define crimes and ordain punishment and the courts are not permitted to extend the application of the statute “by implication or equitable construction” to include acts not clearly within the prohibition. *State v. Hill*, 272 N.C. 439, 443, 158 S.E.2d 329, 332 (1968).

In this case there is no evidence that the defendant exposed his genital organs and the trial court therefore erred in denying the defendant's motion to dismiss.³ See *State v. Corbett*, 307 N.C. 169, 182, 297 S.E.2d 553, 562 (1982) (action must be dismissed if State does not present substantial evidence of each element of crime).

Reversed.

Judge JOHN concurs.

Judge WALKER dissents with separate opinion.

Judge WALKER dissenting.

I would give a broader interpretation to the statute to include buttocks within the definition of “private parts.” In *State v. Jones*, 7 N.C. App. 166, 171 S.E.2d 468 (1970), this Court stated that “[t]he term ‘private parts’ appears to be generally acceptable legal parlance in referring to male or female genitalia.” *Id.* at 167, 171 S.E.2d 468-69. However, I find nothing which leads me to conclude that the definition of “private parts” means only one's genitalia.

A recent case from Virginia is persuasive authority that buttocks should be considered “private parts.” Virginia's indecent exposure

2. Dictionaries may be used to determine the natural and ordinary meaning of words used in statutes. *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970). Dictionaries define “private parts” to be a person's genitals. See *American Heritage Dictionary* 986 (2d college ed. 1982); Bernard S. Maloy, M.D., *Medical Dictionary for Lawyers* 467 (1951); XII *Oxford English Dictionary* 516 (2d ed. 1989).

3. Although the issue is not presented in this case, defendant's conduct may well be in violation of the common law crimes of breach of the peace and/or the creation of a public nuisance. See *State v. Everhardt*, 203 N.C. 610, 617, 166 S.E. 738, 741-42 (1932) (common law public nuisance); *State v. Mobley*, 240 N.C. 476, 482, 83 S.E.2d 100, 104 (1954) (common law breach of the peace); John Snyder, *North Carolina Elements of Criminal Offenses* 207 (5th ed. 1994) (exposure of a person's buttocks “probably constitutes a breach of peace or public nuisance”).

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statute provides in part: "Every person who intentionally makes an obscene display or exposure of his person, or the private parts thereof, in any public place . . . shall be guilty of a Class 1 misdemeanor." Va. Code § 18.2-387. Like this State, Virginia has not further defined "private parts." Nevertheless, in *Hart v. Virginia*, 18 Va. App. 77, 441 S.E.2d 706 (1994), the Court of Appeals of Virginia held that the legislature intended to include buttocks in the category of private parts. The Court reasoned that while the term "private parts" is not defined within the purview of the indecent exposure statute, "other related phrases make clear the legislature's intent to include the groin and buttocks within that category." *Id.* at 79, 441 S.E.2d at 707. The Court was referring to two sections of the Virginia Code. One section which defines "intimate parts" to include "not only genitalia, but also the 'anus, groin, breast or buttocks.'" The other section defines "nudity" as a "state of undress so as to expose the human . . . genitals, pubic area or buttocks. . . ." *Id.*

Like Virginia, our statutes do not specifically state which body parts are included in the term "private parts" under N.C. Gen. Stat. § 14-190.9. However, other criminal statutes within Article 26 (Offenses against Public Morality and Decency) and Article 26A (Adult Establishments) define related phrases which we draw from to establish that our legislature intended to include buttocks as a "private part" under N.C. Gen. Stat. § 14-190.9.

In N.C. Gen. Stat. § 14-190.13, *Definitions for certain offenses concerning minors*, "sexually explicit nudity" is defined in part, as follows:

The showing of:

- a. Uncovered, or less than opaquely covered, human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast. . . .

Similarly, N.C. Gen. Stat. § 14-202.10 defines terms used in Article 26A, *Adult Establishments*. There, the term "specified anatomical areas" is defined in pertinent part as:

- a. Less than opaquely covered: (i) human genitals, pubic region, (ii) buttock, or (iii) female breast below a point immediately above the top of the areola. . . .

Although the purposes of the aforementioned statutes are distinguishable from that of N.C. Gen. Stat. § 14-190.9, they all were

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enacted to prohibit offenses against morality and decency. As such, I would conclude that the term "private parts" was intended to encompass the buttocks.

Defendant's actions were precisely the type of conduct the statute is designed to prohibit. The buttocks are a part of the human body which morality and decency require to be covered in the presence of others. Thus, our statute should be reasonably interpreted to include buttocks within the meaning of "private parts" and to protect citizens from the exposure experienced by the witness on this occasion. On this basis, I respectfully dissent.

CHRISTY RENEE TOOLE, BY AND THROUGH HER GUARDIAN AD LITEM PAUL B. WELCH, III,
AND NEW SOUTH INSURANCE COMPANY, PLAINTIFFS¹ v. STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY, KATHLEEN H. MCCALL, ADMINISTRATRIX
OF THE ESTATE OF ROBIN JEFFREY MCCALL, DECEASED, KATHLEEN H. MCCALL,
GUARDIAN AD LITEM FOR ETHAN F. MCCALL, A MINOR, DAVID WHISENANT, AND
MELISSA ANN MURPHY, DEFENDANTS

No. COA96-1324

(Filed 19 August 1997)

1. Insurance § 1168 (NCI4th)— automobile accident—insurance coverage—lawful possession by driver—no issue of material fact

In a declaratory judgment action arising out of an automobile accident, the trial court correctly held that there was no issue of material fact as to whether plaintiff was in "lawful possession" of the vehicle which she was driving at the time of the accident, pursuant to N.C.G.S. § 20-279.21(b)(2), where the evidence at trial showed that plaintiff had a relationship with the son of registered owner of the vehicle; plaintiff had on a previous occasion driven the vehicle at the son's request; the son referred to the truck as "his"; plaintiff had never been explicitly directed not to use the

1. Plaintiff Unisun Insurance Company (hereinafter "Unisun") was omitted from the caption of the final order of summary judgment from which defendant State Farm Mutual Automobile Insurance Company (hereinafter "State Farm") appeals. We believe this omission to be inadvertent, as the record does not evidence an order to remove plaintiff Unisun as a plaintiff in this action. This Court cannot, however, amend a caption to include a party without a proper order of amendment. The record being absent any order of amendment, plaintiff Unisun will not be listed as a plaintiff in the caption of this opinion.

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truck; and it was the plaintiff's subjective belief that at the time of the accident she was entitled to use the truck.

2. Insurance § 1175 (NCI4th)— automobile accident—insurance coverage—entitlement to use vehicle—reasonable belief—summary judgment—coverage—"subjective reasonable belief"

There was not a genuine issue of material fact as to whether plaintiff had a "subjective, reasonable belief" that she was entitled to use the vehicle she was driving at the time she was involved in an automobile accident where the evidence revealed that there was a personal relationship between plaintiff and the son of the registered owner of the vehicle; the son made representations that he had an ownership interest in the vehicle; plaintiff had had use of the vehicle; and neither the owner of the vehicle nor his son forbade plaintiff's use of the vehicle.

Appeal by defendant State Farm Mutual Automobile Insurance Company from order entered 24 July 1996 by Judge Zoro J. Guice, Jr. in Transylvania County Superior Court. Heard in the Court of Appeals 3 June 1997.

Cloninger, Barbour, & Arcuri, P.A., by Frederick S. Barbour and J. Huntington Wofford, for plaintiffs-appellees.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Allan R. Tarleton, for defendant-appellant State Farm Mutual Automobile Insurance Company.

TIMMONS-GOODSON, Judge.

This declaratory matter arises out of a traffic accident. On 30 April 1994, plaintiff Renee Toole was driving a 1977 Dodge pickup truck to take a friend (defendant Melissa Ann Murphy) home, because her vehicle was not operating properly. Unfortunately, during the trip, the truck driven by plaintiff Toole collided with a 1988 Toyota pickup truck owned and driven by Robin Jeffrey McCall. Mr. McCall subsequently died as a result of the injuries sustained in the collision. Ethan F. McCall, Mr. McCall's minor son, and another passenger, defendant David Whisenant, were injured, as were plaintiff Toole and defendant Murphy.

The truck driven by Ms. Toole was registered with the North Carolina Division of Motor Vehicles to Ernest Galloway. The vehicle

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was insured by defendant State Farm under an automobile liability policy issued to Ernest Galloway with limits of \$100,000 per person/\$300,000 per accident. The policy provided that defendant State Farm would pay damages for bodily injury for which any insured became legally responsible because of an automobile accident. The policy defined an insured as “[a]ny person using your covered auto,” but specifically excluded coverage for any person “[u]sing a vehicle without a reasonable belief that that person is entitled to do so.” Plaintiff New South Insurance Company (hereinafter “New South”) had issued a policy to plaintiff Toole, naming her as the insured. Plaintiff Toole was also insured under a policy issued by plaintiff Unisun to Donna Toole, plaintiff Toole’s mother.

At the time of the 30 April 1994 accident, plaintiff Toole was Randall Galloway’s girlfriend. Randall Galloway is Ernest Galloway’s adult son. Randall Galloway claimed an ownership interest in the 1977 Dodge pickup truck, driven by plaintiff Toole on 30 April 1994, by virtue of a trade of a camper to his father. In fact, Randall Galloway considered the truck to be his, often referring in conversation with others, including plaintiff Toole, to the truck as “his” truck. Shortly before the 30 April 1994 accident, plaintiff Toole had driven the truck at the request of Randall Galloway. Neither Ernest Galloway, nor Randall Galloway had explicitly told plaintiff Toole not to use the truck.

Before taking the truck, plaintiff Toole tried to locate Randall Galloway. Upon being told by his grandmother that Randall was hunting, plaintiff Toole told Randall’s grandmother that she was going to use the truck and asked her to inform Randall if he returned before she got back. Randall Galloway’s grandmother raised no objection to plaintiff Toole’s use of the truck. After learning of the 30 April 1994 accident, Ernest Galloway reported the 1977 Dodge truck to have been stolen. Plaintiffs New South and Unisun have accepted coverage under their policies, while defendant State Farm has denied coverage.

As a result, on 20 October 1995, plaintiffs Toole, by and through her Guardian ad Litem Paul B. Welch, III, New South, and Unisun filed this declaratory judgment action against defendants State Farm, Kathleen H. McCall, Administratrix of the Estate of Robin Jeffrey McCall, deceased, Kathleen H. McCall, Guardian ad Litem for Ethan F. McCall, a minor, David Whisenant, and Melissa Ann Murphy. This matter was heard on plaintiff’s motion for summary judgment by Judge Zoro J. Guice, Jr. at the 15 April 1996 civil session of

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Transylvania County Superior Court. With consent of the parties, Judge Guice entered an order granting summary judgment in favor of plaintiffs out of term, session, and county on 24 July 1996 in Rutherford County. Defendant State Farm appeals.

Defendant State Farm's sole assignment of error on appeal is that the trial court erred in granting plaintiffs' motion for summary judgment, since there were genuine issues of material fact, and plaintiffs were not entitled to judgment as a matter of law. Specifically, defendant State Farm contends that there were genuine issues of material fact as to the following: (1) whether plaintiff Toole was in "lawful possession" of Ernest Galloway's truck pursuant to North Carolina General Statutes section 20-279.21(b)(2); and (2) whether plaintiff Toole had a "reasonable belief" that she was "entitled" to use Ernest Galloway's truck pursuant to defendant State Farm's policy. We cannot agree; and for the reasons stated herein, we affirm the decision of the trial court.

[1] Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). "Where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). It is the moving party's burden to establish the lack of a triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985). Once the moving party has met its burden, the nonmoving party must "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989).

The North Carolina Financial Responsibility Act provides that an owner's policy of automobile liability insurance:

Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, *or any other persons in lawful possession*, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles. . . .

N.C. Gen. Stat § 20-279.21(b)(2) (1993) (emphasis added). In *Hawley*

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v. Insurance Co., 257 N.C. 381, 126 S.E.2d 161 (1962), the North Carolina Supreme Court noted, “[I]t is the purpose of the Financial Responsibility Act to provide protection for persons injured or damaged by the negligent operation of automobiles.” *Id.* at 386-87, 126 S.E.2d at 166. In light of this purpose, the statute will be broadly construed so as “to provide the innocent victim with the fullest possible protection.” *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 324 N.C. 221, 225, 376 S.E.2d 761, 764 (1989).

In the case *sub judice*, the facts are uncontroverted. Plaintiff Toole was the girlfriend of Ernest Galloway’s son, Randall; she had on one previous occasion driven the truck at Randall’s request; Randall Galloway referred to the truck, in conversation with others, as “his” truck; plaintiff Toole had never been explicitly directed not to use the truck; and it was plaintiff Toole’s subjective belief that she was entitled to use the truck on 30 April 1994. Therefore, the facts taken in the light most favorable to defendant State Farm, tend to show that there was no issue of material fact as to whether plaintiff Toole was in “lawful possession” of the Galloway vehicle, pursuant to section 20-279.21(b)(2) of the General Statutes, on 30 April 1994. This being decided, we must now address defendant State Farm’s contention that there was a genuine issue of fact as to whether plaintiff Toole had a “reasonable belief” that she was “entitled” to use the Galloway truck under defendant State Farm’s insurance policy.

[2] Defendant State Farm’s automobile insurance policy provides that “[the company] will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident.” (emphasis omitted). The definition of “insured” includes “Any person using your covered auto.” (emphasis omitted). The policy excludes liability coverage for any person “[u]sing a vehicle without a reasonable belief that that person is entitled to do so.” In *Aetna Casualty & Surety Co. v. Nationwide Mut. Ins. Co.*, 95 N.C. App. 178, 381 S.E.2d 874 (1989), *aff’d*, 326 N.C. 771, 392 S.E.2d 377 (1990), this Court in interpreting an exclusion much like the one found in the State Farm policy presently before us, found the standard to be subjective in nature—i.e., whether *that* person had a “subjective, reasonable belief that they are entitled to use the vehicle.” *Id.* at 181, 381 S.E.2d at 875.

Again, in light of the personal relationship between plaintiff Toole and Randall Galloway; Randall Galloway’s representation that he had an ownership interest in the truck; plaintiff Toole’s prior use

IN RE D.R.D.

[127 N.C. App. 296 (1997)]

of the vehicle; and the failure of either Randall Galloway or Ernest Galloway to forbid plaintiff Toole's use of the vehicle, we find no genuine issue of material fact as to whether plaintiff Toole had a "subjective, reasonable belief" that she was entitled to use the Galloway vehicle on 30 April 1994.

In light of the foregoing, the decision of the trial court granting plaintiffs' motion for summary judgment is affirmed.

Affirmed.

Judges COZORT and MARTIN, Mark D., concur.

Judge COZORT concurred prior to 31 July 1997.

IN RE: D.R.D., D.O.B.: MAY 4, 1983

No. COA96-1054

(Filed 19 August 1997)

**1. Infants or Minors § 128 (NCI4th)— juvenile delinquent—
appropriate treatment—secondary liability of county—due
process**

A county which was found to be secondarily liable for the appropriate treatment of a twelve-year-old juvenile adjudicated delinquent for committing a second-degree sexual offense was not denied due process where the court subsequently allowed the county to intervene, afforded it the opportunity to present evidence and to be heard, and modified the original order.

**2. Infants or Minors § 128 (NCI4th)— juvenile delinquent—
cost of private care—existing institution**

The trial court did not err in ordering defendant Stokes County to pay the costs of private treatment for a juvenile who was adjudicated delinquent for committing a second-degree sexual offense where, unlike *In re Wharton*, 305 N.C. 565, the court ordered that the care be given in an existing private institution after considering alternative programs and their relative costs. N.C.G.S. § 7A-647(3).

IN RE D.R.D.

[127 N.C. App. 296 (1997)]

Appeal by Intervenor Stokes County from an order entered 10 May 1996 by Judge Otis M. Oliver in Stokes County District Court. Heard in the Court of Appeals 12 May 1997.

Browder & McGrath, P.A., by John L. McGrath, for Intervenor-appellant Stokes County.

Attorney General Michael F. Easley, by Special Deputy Attorney General John R. Corne and Assistant Attorney General V. Lori Fuller, for the State.

Jeffrey S. Lisson, attorney for respondent-appellee.

McGEE, Judge.

On 9 February 1996, a twelve-year-old juvenile was adjudicated delinquent during the Juvenile Session of Stokes County District Court for committing a second degree sexual offense. On 23 February 1996 the juvenile's dispositional hearing was held. Rusty Slate (Slate), the juvenile court counselor with the District 17-B Court Counselor's Office, who had been involved in the juvenile's case since 22 September 1995, testified that residential treatment was appropriate for the juvenile and after investigating alternative treatment programs, an inpatient residential sex offender treatment program at Charter Hospital in Winston-Salem was the only appropriate alternative he had found to training school. Charter Hospital would not accept the juvenile without a court order stating that Stokes County would pay the \$340.00 a day cost of treatment for the estimated period of treatment of one year.

After hearing Slate's testimony the trial court made the following findings of fact:

6. Based upon the Juvenile Court Counselor's review of the charges, psychiatric records of a prior inpatient stay at Charter Hospital . . . and interviews with the parents and law enforcement, the only appropriate disposition for the Juvenile is some form of inpatient, residential sex offender treatment.

7. All sex offender treatment programs have a cost which far exceeds the ability of the parents to pay.

8. Based upon the court counselor's investigation of public assistance, private insurance, and other sources of funding, no funds are available to pay for the treatment which the Juvenile requires.

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9. The only parent available to pay for treatment is the juvenile's mother, Brenda Zrinski, who works at a Hardee's Restaurant and barely earns enough to pay her own monthly expenses. She has no medical or health insurance of her own. The Juvenile's father is incarcerated in state prison.

...

13. The Court finds as a fact that the only alternative to commitment to a state training school is the program recommended by the court counselor. The Court further finds that training school is not an appropriate alternative at this time, as there is a community-based alternative available. No other community-based alternatives are available other than the program recommended by the court counselor.

...

17. All other treatment programs which the court counselor has investigated have equal impediments to the Juvenile's entry, in that insurance, state Medicaid, or other funds will not pay for the programs, and the parents likewise will not be able to pay those costs.

18. No other community-based alternatives are available.

Based upon these findings of fact, the trial court made the following conclusions of law:

2. Brenda Zrinski is the natural mother of [the juvenile], and is primarily responsible for his care and needs, and further is responsible for any costs of medical/psychological and psychiatric treatment. Mike Zrinski, the stepfather of the Juvenile, is not legally obligated to support the Juvenile.

3. The sex offender treatment program at Charter Hospital in Winston-Salem, North Carolina, is the appropriate community-based alternative to training school for the Juvenile, and is the only appropriate community-based alternative for the Juvenile.

4. Training school is not an appropriate alternative for the Juvenile at this time.

5. Stokes County, North Carolina, is subject to the Court ordering that it pay the expenses of the Juvenile for treatment which the Court hereby finds to be necessary and appropriate.

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The trial court then ordered:

2. The Juvenile shall enter and successfully complete the residential sex offender treatment program at Charter Hospital in Winston-Salem, North Carolina.

...

5. The Juvenile's parents are primarily responsible for payment of the costs of the hospital program.

6. Stokes County, North Carolina, shall be secondarily liable to pay the costs of the Charter Hospital program, \$340.00 per day, if the parents are unable to pay and no insurance or other programs are available to pay those costs.

On 6 March 1996 Stokes County (County) filed a motion to intervene which was granted on 26 March 1996. On 1 April 1996 the County filed a motion to modify and motion for relief from the 23 February 1996 order. The motion stated six reasons why the trial court's order for the County to pay in excess of \$124,000 per year for the juvenile's hospital stay was error. After hearing evidence from the County and a representative from the Forsyth/Stokes Mental Health Department, the trial court denied the motion for relief and modified its existing order on 10 May 1996. The modified order provided that "Forsyth/Stokes Mental Health will develop a plan of treatment and mobilize [its] resources to meet the Juvenile's needs and to implement [its] plan to provide intensive sex offender's specific residential treatment, as needed." It effectively gave the Forsyth/Stokes Mental Health agency the authority to assume care of the juvenile when they had an adequate program in place to meet his needs.

This case is governed by N.C. Gen. Stat. § 7A-647(3) (1981). The version of the statute in effect when this action was heard stated in pertinent part:

If the judge finds the juvenile to be in need of medical, surgical, psychiatric, psychological or other treatment, he shall allow the parent or other responsible persons to arrange for care. If the parent declines or is unable to make necessary arrangements, the judge may order the needed treatment, surgery or care, and the judge may order the parent to pay the cost of such care pursuant to [N.C.G.S. § 7A-650]. If the judge finds the parent is unable to pay the cost of care, the judge may charge the cost to the county.

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[1] The County first argues it was denied due process in violation of the Fourteenth Amendment when it was not given notice and an opportunity to be heard in the proceeding in which the trial court ordered that the County pay the juvenile's hospital expenses. We disagree. Assuming *arguendo* that the County had a constitutional right to notice and a hearing in this case, the trial court did afford the County the opportunity to be heard when the court allowed the County to intervene in the action on 5 March 1996, and further allowed the County to present evidence in a 29 April 1996 hearing. After hearing the County's evidence, the trial court modified its original dispositional order. The amended order directs the Forsyth/Stokes Mental Health Department to "develop a plan of treatment and mobilize it's [sic] resources to meet the Juvenile's needs and to implement it's [sic] plan to provide intensive sex offender's specific residential treatment, as needed: development of a step-down plan to a high or moderate level management as deemed appropriate by a good clinical judgment." The trial court's amended order clearly provides for further modification of the juvenile's treatment plan on an "as needed basis." The County had notice and the opportunity to be heard. Thus, we hold that the County's Fourteenth Amendment rights were not violated.

We note the General Assembly also recognized the need for participation by counties in the dispositional stage and amended N.C.G.S. § 7A-647(3) to require the trial judge to notify a representative of the county and provide the representative an opportunity to be heard at the juvenile's dispositional hearing, effective 1 December 1996 and applicable to dispositions for offenses committed on or after that date.

[2] Next, the County cites *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982), for the proposition that the trial court did not have the authority to require a county to pay the costs of the Charter Hospital Program under N.C. Gen. Stat. § 7A-647(3). We disagree. In *Wharton*, the trial court ordered a county department of social services, in conjunction with another state agency, to "implement the creation of a foster home" and provide for its maintenance to meet the needs of one specific juvenile, and others like him. 305 N.C. 565, 570, 290 S.E.2d 688, 689. Our Supreme Court reversed this order, holding that although N.C.G.S. § 7A-646 "affords the [trial] court considerable flexibility 'to design an appropriate plan to meet the needs of the juvenile,'" it did not authorize the trial court "to direct a county or any of its agencies to spend large sums of money in the acquisition of

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[127 N.C. App. 301 (1997)]

real estate, either by purchase or lease, in the equipping and furnishing of the property, and in employing personnel” to provide for a particular juvenile. *Wharton*, at 574, 290 S.E.2d at 693. Rather than creating a new institution as the trial court attempted in *Wharton*, the trial court in this case ordered the County to pay the costs of a juvenile’s care in an existing institution after considering all alternative programs presented to the court and their relative costs. We hold that the trial court was acting within the scope of N.C. Gen. Stat. 7A-647(3) which authorizes a trial court to “order the needed treatment, surgery or care” for the juvenile and thus affirm the trial court’s order.

Affirmed.

Judges EAGLES and SMITH concur.

ESTATE OF DWAIN LYDELL DARBY, BY LISTON S. DARBY, ADMINISTRATOR, PLAINTIFF V.
MONROE OIL COMPANY, INCORPORATED AND CITY OF MONROE BOARD OF
ALCOHOLIC BEVERAGE CONTROL, DEFENDANTS AND THIRD-PARTY PLAINTIFFS V.
ESTATE OF OTIS STEPHEN BLOUNT, BY JOSEPH L. HUTCHERSON, II,
ADMINISTRATOR, THIRD-PARTY DEFENDANT

No. COA96-1381

(Filed 19 August 1997)

Intoxicating Liquor § 63 (NCI4th)— car accident—Dram Shop Act—underage driver—aiding and abetting

The trial court did not err by granting summary judgment for defendant Monroe Oil Company in an action under the Dram Shop Act, N.C.G.S. § 18B-120 *et seq.*, where the court concluded that the plaintiff was not an “aggrieved party” within the meaning of the Act because the evidence indicated that plaintiff’s decedent assisted the underage driver of the car in purchasing the alcohol which contributed to the accident. Although the courts have not previously addressed the issue of what constitutes “aiding and abetting” in the context of the Dram Shop Act, there are a plethora of criminal cases which define the term.

Appeal by plaintiff from order entered 31 January 1996 by Judge Peter M. McHugh in Union County Superior Court. Heard in the Court of Appeals 5 June 1997.

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Griffin, Caldwell, Helder, Lee & Helms, P.A., by W. David Lee and R. Kenneth Helms, Jr., for plaintiff.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Timothy G. Barber and Steven D. Gardner, for defendant Monroe Oil Company.

WYNN, Judge.

This civil action arose out of an alcohol related single car accident that occurred shortly after midnight on 1 May 1993 in Union County, North Carolina. Tragically, the accident killed all of the occupants including the driver, Otis Blount; the front seat passenger and owner of the vehicle, Dwaine Lydell Darby; and two backseat passengers, Melissa Mullis and Patricia Teel. All were under twenty-one (21) years of age.

Viewing the evidence in the light most favorable to the appellant Estate of Darby, as we must in deciding the propriety of a summary judgment, we find that the record indicates that earlier that evening, Blount on at least two occasions purchased liquor for himself and others from a store operated by the Monroe County Alcoholic Beverage Control Board ("Monroe ABC"). Afterwards, Blount and Dwaine Darby gathered with others at TJ's, a local teen spot in Monroe, North Carolina. While at that night spot, someone used what appears to have been car keys to scratch the initial "DK" into Darby's car. Thereafter, Blount drove Darby's car—with Darby as a passenger—in search of the person suspected of making the scratch. The record indicates that Blount drove Darby's car wildly through Union County, traveling at high speeds, careening off the road twice and spinning into a ditch. Unable to find the person suspected of making the initials, they returned to TJ's.

For reasons not given in the record, the group including Blount, Darby and other teens were asked to leave TJ's. They decided to go to one of the teens' house for a party. Before leaving the night spot, several of the teens contributed money so that Blount could buy beer for them for the party. Darby did not contribute any money; however, he drove his car with Blount, Mullis and Teel as passengers to a convenience store operated by Monroe Oil Company, Inc. ("Monroe Oil Company"). There, Blount purchased beer and returned to the car, but this time as the driver. On the way to the party, Blount ran off the road and crashed into a tree killing all occupants.

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Darby's estate sued Monroe ABC and Monroe Oil Company under N.C. Gen. Stat. § 18B-120 *et seq.* (1996) ("the Dram Shop Act") and N.C. Gen. Stat. § 28A-18 *et seq.* (1996) ("the Wrongful Death Statute"). Following a pretrial hearing, the trial court denied Monroe ABC's motion for summary judgment but granted summary judgment in favor of Monroe Oil. Prior to the trial of the claim against Monroe ABC, Darby's estate settled with Monroe ABC and the trial court entered judgment accordingly. Thereafter, Darby's estate appealed the earlier grant of summary judgment in favor of Monroe Oil to this Court.

The dispositive issue on appeal is whether Dwaine Darby aided and abetted Otis Blount in the purchase of beer from Monroe Oil and therefore is not an "aggrieved party" within the meaning of the Dram Shop Act. We hold that he did and therefore conclude that his estate may not recover against Monroe Oil under the Dram Shop Act.

An action brought under the Dram Shop Act is an action brought against the permittee or local Alcohol Beverage Control Board for negligently selling or furnishing alcohol to an underage person who, after becoming impaired, negligently operates a vehicle and causes injury. N.C.G.S. § 18B-121. To recover under the Dram Shop Act, an individual must be an "aggrieved party" as defined by that statute which states:

"Aggrieved party" means a person who sustains an injury as a consequence of the actions of the underage person, *but does not include the underage person or a person who aided or abetted in the sale or furnishing to the underage person.*

N.C.G.S. § 18B-120 (emphasis added).

Our Courts have not previously addressed the issue of what constitutes "aiding and abetting" in the context of the Dram Shop Act. We are, however, guided by a plethora of criminal law cases which define that term as:

An aider or abettor is a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates or encourages another to commit the offense.

State v. Barnette, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981); *State v. Bell*, 270 N.C. 25, 153 S.E.2d 741 (1967); *State v. Hargett*, 255 N.C. 412, 121 S.E.2d 589 (1961); 7 Strong's North Carolina Index 4th, Criminal Law § 44 (1989).

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In this case, the pertinent facts show that Blount and Darby were part of a group of teens who gathered at TJ's, a local teen night spot in Monroe, North Carolina. The group was asked to leave the club and they decided to go to someone's home for a party. Before leaving TJ's, the group decided to get some alcohol and several of them contributed money so that Blount could purchase beer. While the evidence tends to indicate that Darby did not contribute any money towards the purchase of the alcohol, he did drive Blount to the convenience store in his own car. Once at the store, he waited in his car while Blount purchased the beer and upon Blount's return to the vehicle, he permitted Blount to drive his car with the illegally purchased beer. Thus, irrefutably Darby actively assisted Blount in the purchase of the beer. Under these facts, we must find that he "aided and abetted" Blount in the purchase of the beer. We are therefore constrained by the legislature's "aided and abetted" exception to the definition of an "aggrieved party" to find that his estate's claim under the Dram Shop Act is barred as a matter of law.

Accordingly, the order of the trial court granting Monroe Oil's motion for summary judgment is,

Affirmed.

Judges LEWIS and MARTIN, John C., concur.



KEVIN R. TRANTHAM; GARY D. WARREN AND WIFE, PEGGY M. WARREN, PLAINTIFFS
v. KENNETH LANE, INDIVIDUALLY; MACON COUNTY SHERIFF'S DEPARTMENT;
AND MACON COUNTY, NORTH CAROLINA, DEFENDANTS

No. COA96-1086

(Filed 19 August 1997)

1. Appeal and Error § 111 (NCI4th)— public officer immunity—refusal to dismiss complaint—immediate appeal

The trial court's denial of a motion to dismiss claims against a deputy sheriff in his individual capacity on the basis of public officer immunity was immediately appealable.

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2. Public Officers and Employees § 35 (NCI4th); Sheriffs, Police, and Other Law Enforcement Officers § 13 (NCI4th)— action against deputy sheriff—individual capacity—immunity

The father, aunt and uncle of a child failed to state a claim for negligence against a deputy sheriff in his individual capacity based upon assistance to the mother in regaining custody of the child, although the caption of the complaint stated that the deputy was being sued individually, where the overall tenor of the complaint focused on the deputy's official duties as a law officer, and the complaint failed to assert liability for negligence against the deputy separate from his official duties. Therefore, the deputy was entitled to immunity, and the trial court should have dismissed the complaint.

Appeal by defendant Kenneth Lane from order entered 24 June 1996 by Judge Raymond A. Warren in Macon County Superior Court. Heard in the Court of Appeals 13 May 1997.

Jack W. Stewart for plaintiff appellees.

Womble Carlyle Sandridge & Rice, P.L.L.C., by G. Michael Barnhill and W. Clark Goodman, for defendant appellant Kenneth Lane.

COZORT, Judge.

The question presented by this appeal is whether or not the trial court erred by deciding not to dismiss a complaint against a Deputy Sheriff who was assisting a spouse in regaining custody of her son. Even though the complaint purports to sue the Deputy in his individual capacity, we find that the allegations of the complaint relate only to the Deputy's official duties, and we hold the trial court erred by not dismissing the action as to the Deputy. The facts follow.

On 24 April 1992, plaintiff Kevin Trantham and Kimberly W. Trantham entered into a separation agreement, which provided that Kimberly Trantham would maintain primary care and custody of their two-year-old son Zachary Ray Trantham. On 9 January 1993, Zachary Ray Trantham was at the home of his paternal aunt and uncle, plaintiffs Gary and Peggy Warren. Gary and Peggy Warren live in the private community of Highland Falls Country Club. Defendant, Deputy Sheriff Kenneth Lane, was dispatched to pick up Kimberly Trantham

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and her boyfriend in order to assist Kimberly Trantham in regaining custody of her son from the Warrens.

When Deputy Lane and Kimberly Trantham arrived at the Warrens' residence, Peggy Warren objected to surrendering custody of the minor child based on a pending custody action filed by plaintiff Kevin Trantham. Deputy Lane advised the Warrens that he had a court order signed by a judge authorizing him to take custody of the minor child. Deputy Lane insisted that the Warrens turn over custody of the minor child to Kimberly Trantham. Deputy Lane entered the Warrens' home to make a telephone call and before leaving the premises took custody of the minor child and turned him over to Kimberly Trantham.

On 8 January 1996, plaintiffs filed a complaint alleging claims arising out of Deputy Lane's actions in his capacity as a Deputy Sheriff in the office of the Macon County Sheriff. On 7 March 1996, defendants filed an answer which included a motion to dismiss for lack of jurisdiction over the subject matter, over the person, insufficiency of service of process and failure to state a claim upon which relief can be granted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (2), (5) and (6) (1990). On 24 June 1996, the trial court granted defendants' motion as to all claims against the Macon County Sheriff's Department, Macon County, and Kenneth Lane in his official capacity. The trial court denied the motion as to all claims against Kenneth Lane in his individual capacity. From this order defendant appeals.

[1] Defendant seeks review of the trial court's denial of the motion to dismiss all claims against Deputy Lane in his individual capacity on the basis of public officer immunity. Initially, "we must note that an order which does not completely dispose of a case is interlocutory and generally not appealable." *Moore v. Evans*, 124 N.C. App. 35, 39, 476 S.E.2d 415, 419 (1996). The denial of a motion to dismiss is not ordinarily subject to immediate appellate review, but where the motion is based on a substantial claim of immunity, an immediate appeal shall lie. *Faulkenbury v. Teachers' & State Employees' Retirement Sys.*, 108 N.C. App. 357, 365, 424 S.E.2d 420, 423, *appeal dismissed and disc. review denied*, 334 N.C. 162, 432 S.E.2d 358-59, *aff'd*, 335 N.C. 158, 436 S.E.2d 821 (1993).

[2] Defendant argues that the trial court erred in denying the motion to dismiss as to plaintiffs' claims against Deputy Lane in his individual capacity. We agree. The general rule regarding official immunity

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is: “ ‘As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, . . . keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability.’ ” *Golden Rule Ins. Co. v. Long*, 113 N.C. App. 187, 194, 439 S.E.2d 599, 603, *appeal dismissed and disc. review denied*, 335 N.C. 555, 439 S.E.2d 145-46 (1993). This Court has also held that, while “named defendants may be shielded from liability in their official capacities, they remain *personally* liable for any actions which may have been corrupt, malicious or perpetrated outside and beyond the scope of official duties.” *Locus v. Fayetteville State University*, 102 N.C. App. 522, 526, 402 S.E.2d 862, 865 (1991). To sustain the personal or individual capacity suit, the plaintiff must initially make a *prima facie* showing that the defendant-official’s tortious conduct falls within one of the immunity exceptions, *i.e.*, that the official’s conduct is malicious, corrupt, or outside the scope of official authority. *Epps v. Duke University, Inc.*, 122 N.C. App. 198, 205, 468 S.E.2d 846, 852, *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996).

“Although a plaintiff generally designates in the caption of his or her complaint in what capacity a defendant is being sued, this caption is not determinative on whether . . . a defendant is actually being sued in his or her individual or official capacity.” *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 279 (1993), *cert. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994). The court must inspect the text of the complaint as a whole to determine the true nature of the claim. *Lynn v. Clark*, 254 N.C. 460, 460-61, 119 S.E.2d 187, 188 (1961). If the plaintiff fails to advance any allegations in his or her complaint other than those relating to a defendant’s official duties, the complaint does not state a claim against a defendant in his or her individual capacity, and instead, is treated as a claim against defendant in his official capacity. *Whitaker v. Clark*, 109 N.C. App. 379, 383-84, 427 S.E.2d 142, 145, *disc. review denied and cert. denied*, 333 N.C. 795, 431 S.E.2d 31 (1993); *see Aune v. University of North Carolina*, 120 N.C. App. 430, 436-37, 462 S.E.2d 678, 683 (1995), *disc. review denied*, 342 N.C. 893, 467 S.E.2d 901 (1996); *Gregory v. City of Kings Mountain*, 117 N.C. App. 99, 102-03, 450 S.E.2d 349, 353 (1994); *Stancill v. City of Washington*, 29 N.C. App. 707, 710, 225 S.E.2d 834, 836 (1976).

In the present case, the overall tenor of the complaint focuses on defendant Lane’s official duties as a law enforcement officer. Plaintiffs fail to advance allegations in the complaint to assert liabil-

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ity for negligence against Deputy Lane separate from his official duties; the complaint fails to state a claim against defendant Lane in his individual capacity. The words "individual" or "individual capacity" can be found only in the caption, not in the body of the complaint. Plaintiffs use the following language in their complaint:

10. That on or about January 9, 1993, Deputy Kenneth Lane of the Macon County Sheriff's Department, while acting as a public law enforcement officer under the color of title and authority, was dispatched from his office in Franklin, North Carolina

* * * *

17. That the Plaintiffs' [sic] aver that the actions of Deputy Kenneth Lane, being a public law enforcement officer, duly sworn and authorized to enforce the law, did intentionally misrepresent his purpose, falsely advance his claim of a non-existent court order, and exceed his authority to enter the home while acting under color of title and office to remove the minor child from the care and control of the Plaintiffs in the manner herein described above.

After review of this language and the complaint as a whole, we hold that plaintiffs have asserted a negligence claim against defendant in his official capacity alone. The trial court erred by denying the motion to dismiss as to plaintiffs' claims against Deputy Lane individually. Accordingly, we reverse the ruling of the trial court and remand for entry of an order granting the motion to dismiss claims against Deputy Lane in his individual capacity. Because we reverse and remand for the above mentioned reasons, we need not address defendant's second assignment of error.

Reversed and remanded.

Judges MARTIN, Mark D., and TIMMONS-GOODSON concurred in this opinion prior to 31 July 1997.

DEW v. STATE EX REL. N.C. DEPT. OF MOTOR VEHICLES

[127 N.C. App. 309 (1997)]

DAVID WARREN DEW, PLAINTIFF/APPELLEE v. STATE OF NORTH CAROLINA *EX REL.*
THE NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES, ALEXANDER
KILLENS, COMMISSIONER, DEFENDANT/APPELLANT

No. 96-1216

(Filed 19 August 1997)

1. Administrative Law and Procedure § 67 (NCI4th)— judicial review—arbitrary or capricious decision—whole record test

Judicial review of whether an agency's decision was arbitrary or capricious requires a "whole record" review, which requires the reviewing court to examine all competent evidence to determine whether the agency decision was supported by "substantial evidence."

2. Automobiles and Other Vehicles § 172 (NCI4th)— felony involving marijuana—moral turpitude—revocation of dealer's and salesman's licenses

The felony of conspiracy to possess with the intent to distribute marijuana is, as a matter of law, a crime involving moral turpitude within the meaning of the statute permitting the Department of Motor Vehicles to revoke a motor vehicle dealer's license and a motor vehicle salesman's license upon the licensee's conviction of a felony involving moral turpitude. N.C.G.S. § 20-294(9).

Appeal by defendant from order entered 26 July 1996 by Judge D. Jack Hooks in Columbus County Superior Court. Heard in the Court of Appeals 30 April 1997.

Lee & Lee, Attorneys, by Junius B. Lee, III, for plaintiff-appellee.

Attorney General Michael F. Easley, by Assistant Attorney General Bryan E. Beatty, for defendant-appellant.

McGEE, Judge.

On 6 October 1995, the Commissioner of the North Carolina Department of Motor Vehicles (DMV) revoked plaintiff David Warren Dew's motor vehicle dealer's license and motor vehicle salesman's license. This action resulted from plaintiff's 1 June 1995 conviction in federal district court for conspiracy to possess with the intent to distribute marijuana in violation of 21 USC § 846, a Class E felony.

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Plaintiff filed this action on 31 October 1995, along with an application for a temporary restraining order, which was thereafter granted. In an order entered 26 July 1996, the trial court reversed DMV's decision and reinstated plaintiff's licenses. The trial court concluded as a matter of law that plaintiff's felony conviction of conspiracy to possess with intent to distribute marijuana was not a felony involving moral turpitude upon which the Commissioner of DMV has authority to suspend or revoke licenses.

The issue before this Court is whether conspiracy to possess with the intent to distribute marijuana is a crime involving moral turpitude.

[1] The standard of review for the superior court of a final agency decision "depends upon the particular issues presented on appeal." *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997); *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). N.C. Gen. Stat. § 150B-51(b) provides:

[T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

* * *

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

* * *

(6) Arbitrary or capricious.

G.S. § 150B-51(b) (1995). Plaintiff alleged in his complaint that DMV's decision was prejudicial to him under all the above provisions.

Judicial review of whether an agency decision was based on an error of law requires a *de novo* review. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), review denied, 328 N.C. 98, 402 S.E.2d 430 (1991). When the plaintiff questions "whether the decision was arbitrary or capricious," the 'whole record' test must be applied. *ACT-UP*, 345 N.C. at 706, 483 S.E.2d at 392 (citation omitted). The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole

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record') in order to determine whether the agency decision is supported by 'substantial evidence.' *Id.* (internal quotes omitted) (quoting *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118).

[2] DMV administers Chapter 20, Article 12 of the N.C. General Statutes, also known as the Motor Vehicle Dealers and Manufacturers Licensing Law. *See* N.C. Gen. Stat. § 20-285 *et. seq.* (1993). A DMV hearing officer held plaintiff in violation of G.S. § 20-294, which states in pertinent part:

The Division may deny, suspend, or revoke a license issued under this Article for any one or more of the following grounds:

* * *

- (9) . . . being convicted of a felony involving **moral turpitude** under the laws of this State, another state, or the United States.

G.S. § 20-294 (1993) (emphasis added). The trial court made no findings that DMV acted in an arbitrary or capricious manner, and reversed DMV's decision based solely upon its conclusion of law that plaintiff's crime was not one involving moral turpitude. Pursuant to the requirements set forth in *ACT-UP*, we review the superior court's order regarding its agency review for error of law. *ACT-UP*, 345 N.C. at 706, 483 S.E.2d at 392. Therefore, we must determine if the trial court's conclusion of law that plaintiff's crime was not one involving moral turpitude was in error.

Contrary to plaintiff's contention, the term 'moral turpitude' is deeply rooted in American law. *See Jordan v. De George*, 341 U.S. 223, 227, 95 L. Ed. 886, 890 (1951). Our Supreme Court long ago defined crimes involving moral turpitude as "act[s] of baseness, villainess, or depravity in the private and social duties that a man owes to his fellowman or to society in general." *Jones v. Brinkley*, 174 N.C. 23, 27, 93 S.E. 372, 373 (1917). The Court recently repeated this definition in *State v. Mann*, 317 N.C. 164, 170, 345 S.E.2d 365, 369 (1986).

In a recent federal decision from the Middle District of North Carolina, the court stated "[v]irtually all courts agree that narcotics possession *with intent to distribute* is a crime involving moral turpitude." *Alexander v. Exxon Co.*, 949 F. Supp. 1248, 1253 (M.D.N.C. 1996) (quoting *Portaluppi v. Shell Oil Co.*, 684 F. Supp. 900, 904 (E.D. Va. 1988) *aff'd* 869 F.2d 245 (4th Cir. 1989)); *see also United States ex rel. Deluca v. O'Rourke*, 213 F.2d 759, 762 (8th Cir. 1954) ("there can

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be nothing more depraved or morally indefensible than conscious participation in the illicit drug traffic.”). The Supreme Court of South Carolina, which similarly defines acts of moral turpitude as those involving “baseness, vileness, or depravity in private and social duties which man owes to his fellow man or to society in general,” recently held trafficking in marijuana to be a crime involving moral turpitude. *Green v. Hewett*, 407 S.E.2d 651, 652 (S.C. 1991).

We hold as a matter of law that the felony of ‘conspiracy to possess with intent to distribute marijuana’ is a crime involving moral turpitude. Therefore, the trial court erred in its conclusion of law and the order of the trial court is hereby reversed. This matter is remanded to the superior court for subsequent remand to DMV with direction to reinstate DMV’s order of 6 October 1995 consistent with our opinion herein.

Reversed and remanded.

Judges COZORT and MARTIN, John C., concur.

Judge Cozort participated in this opinion prior to his resignation on 31 July 1997.



LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO; NATIONAL POULTRY WORKERS ORGANIZING COMMITTEE, AFFILIATED WITH THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO; ROBERTO SOLIZ VICENTE; ROBERTO MENDOZA; JOSE SAMUEL SOLIS; ESTEBAN SALINAS HERNANDEZ; JUAN IGNACIO MONTES; DANIEL RODRIGUEZ; CARMEN I. MIRANDA; FRANCISCO RAMIREZ R.J.; NOE GONZALEZ; JUAN RODRIGUEZ; FOR THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. CASE FARMS, INC., DEFENDANT

No. COA96-1042

(Filed 19 August 1997)

1. Labor and Employment § 12 (NCI4th)— Wage and Hour Act—suit to recover wages due—no standing by unions

Labor unions were not employees under the Wage and Hour Act and thus did not have standing to bring suit on behalf of employee-members to recover wages allegedly due under the Act

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since (1) no services were performed by the unions for defendant employer as there was no work relationship between the unions and defendant; (2) defendant did not exercise any control over the unions; and (3) any opportunity for profit or loss from the unions' relationship with defendant was indirect and not a product of an employer-employee relationship. Moreover, the General Assembly did provide for collective representation of employees by a third party under N.C.G.S. § 95-25.22(c) by allowing the Commissioner of Labor to bring suit on behalf of employees. N.C.G.S. § 95-25.22.

2. Parties § 70 (NCI4th)— class action statute—no grant or denial of standing

N.C.G.S. § 1A-1, Rule 23 allows a party who is entitled to sue to bring suit on behalf of itself and other parties in the form of a class action but does not grant or deny standing to parties.

Appeal by plaintiffs from an order entered 14 June 1996 by Judge J. Marlene Hyatt in Burke County Superior Court. Heard in the Court of Appeals 19 May 1997.

Phyllis A. Palmieri for plaintiff-appellants.

Edwards, Ballard, Clark, Barrett and Carlson, P.A., by Terry A. Clark and Jonathan W. Yarbrough, for defendant-appellee.

McGEE, Judge.

[1] Plaintiffs appeal from an order granting defendant's motion to dismiss the plaintiff unions for lack of standing to bring suit to recover wages alleged to be owed to plaintiff employees by defendant. Defendant is a poultry processing plant in Morganton, North Carolina. Laborers' International Union of North America (LIUNA) and National Poultry Workers Organizing Committee (NPWOC) and ten employees of defendant are parties to this action.

The main issue in this case is whether the plaintiff unions have standing to bring suit on behalf of the plaintiff employees under the North Carolina Wage and Hour Act, N.C. Gen. Stat. § 95-25.22 (1993).

The Wage and Hour Act states that an action to recover unpaid wages "may be maintained in the General Court of Justice by any one or more employees" or by the Commissioner of Labor "at the request

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of the employees affected.” N.C.G.S. § 95-25.22(b)(c). The Wage and Hour Act’s definition section states: “(3) ‘Employ’ means to suffer or permit to work. (4) ‘Employee’ includes any individual employed by an employer.” N.C.G.S. § 95-25.2(3)(4). Plaintiffs argue that a union is included in the statute’s definition of “employee” because the word “includes” does not limit the meaning of “employee” to individuals. We disagree.

The North Carolina Wage and Hour Act is modeled after the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 (1938). In *Poole v. Local 305 Nat’l Post Office Mail Handlers*, 69 N.C. App. 675, 677, 318 S.E.2d 105, 107 (1984) (holding that union members were not “employees” of the union under the FLSA), our Court recognized that the policy of the Wage and Hour Act is to “protect[] those who, as a matter of economic reality, are dependent upon the business to which they render service.” *Id.* at 678, 318 S.E.2d at 107. In determining the scope of the term “employee” in *Poole*, our Court relied upon federal case law that interpreted the term “employee” as used in the FLSA. *Id.* A further examination of federal case law interpreting “employee” under the FLSA reveals that while federal jurisdictions have rejected a narrow interpretation of “employee,” see *Usery v. Pilgrim Equip. Co., Inc.*, 527 F.2d 1308, 1315, (5th Cir.), cert. denied, 429 U.S. 826, 50 L. Ed. 2d 89 (1976) (“[b]roader economic realities are determinative” of the definition of employee), they have not held that the definition is sufficiently broad to include unions. *International Ass’n of Firefighters v. City of Rome, Ga.*, 682 F. Supp. 522, 534 (N.D. Ga. 1988) (holding “a union lacks standing to maintain an action as a plaintiff under the FLSA” and dismissing the union as a party to the action); accord *Equal Employment Op. Com’n v. American Tel. & Tel. Co.*, 365 F. Supp. 1105, 1121 (E.D. Pa. 1973), modified, 506 F.2d 735 (3rd Cir. 1974) (union official not permitted to bring representative action to recover back wages of its members.)

Several factors used by federal jurisdictions to determine “employee” status under the FLSA are equally useful in the context of the Wage and Hour Act: (1) whether the alleged employee performs services for the employer; (2) “the degree of control exerted by the alleged employer” over the individual or entity; and (3) the alleged employee’s “opportunity for profit or loss” derived from its relationship with the employer. *Harper v. San Luis Valley Regional Medical Ctr.*, 848 F. Supp. 911, 914 (D. Colo. 1994). Although the United States Supreme Court has recognized that labor unions have standing to assert the rights of employee-members for damages for unpaid wages

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under the Worker Adjustment and Retraining Notification Act (WARN) in *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 134 L. Ed. 2d 758 (1996), the Court's decision was based partly on the explicit language of the WARN Act which states a "person seeking to enforce such liability, [under the Act] including a representative of employees" may bring suit. The language of the N.C. Wage and Hour Act contains no such legislative mandate for representative suit by a union. Instead, the statute also allows for suit by the Commissioner of Labor "at the request of the employees affected." N.C.G.S. § 95-25.22(c).

Applying the above analysis to the facts in our case, we determine the plaintiff unions in this case lack standing under the Wage and Hour Act in that: (1) no services were performed by the unions for defendant as there was no work relationship between the unions and defendant; (2) defendant did not exercise any control over the unions; and (3) any opportunity for profit or loss from the unions' relationship with defendant was indirect and not a product of an employer-employee relationship. *Harper*, 848 F. Supp. at 914. Moreover, the General Assembly did provide for collective representation of employees by a third party under N.C. Gen. Stat. § 95-25.22(c) by allowing the Commissioner of Labor to bring suit on behalf of employees. In the absence of other policy or precedent indicating that our definition of "employee" should be sufficiently broader than the plain language of our statute, we hold that only "individuals employed by an employer" or the Commissioner of Labor may bring suit for an employee under the Wage and Hour Act.

[2] Next, the plaintiff unions argue that even if the language of the Wage and Hour Act is not determinative of whether they have standing to sue, N.C. Gen. Stat. § 1A-1 (1990), Rule 23 allows them to bring suit. We disagree. This statute provides in pertinent part:

(a) . . . If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued.

This statute does not grant or deny standing to parties. Rather than providing a basis for standing, this statute allows a party who is entitled to sue to bring suit on behalf of itself and other parties in the form of a class action. See *Canaan v. Reed*, 53 N.C. App. 589, 591, 281 S.E.2d 408, 410 (1981). We thus hold that the plaintiff unions lack

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standing and confirm the trial court's order dismissing plaintiff unions on this ground.

Affirmed.

Judges EAGLES and SMITH concur.

STATE OF NORTH CAROLINA v. JERRY WAYNE BALLARD

No. COA96-1153

(Filed 2 September 1997)

1. Evidence and Witnesses § 90 (NCI4th)— second-degree murder—intoxicated operation of motor vehicle—statements to psychologists—not admissible

In a second-degree murder prosecution which resulted from defendant's operation of a motor vehicle while he was intoxicated, the trial court did not abuse its discretion by excluding defendant's statements to a psychologist where the court allowed the psychologist to give his opinion of defendant's state of mind at the time of the accident, but reasoned that the helpfulness of the hearsay testimony was outweighed by the prejudice to the State in not being able to cross-examine defendant.

2. Homicide § 523 (NCI4th)— second-degree murder—instruction on malice—guilty pleas to other offenses—considered on malice

There was no plain error where the court instructed the jury in a second-degree murder trial arising from a car accident that it could consider defendant's guilty pleas to driving with a revoked license, no insurance, a fictitious tag and unsafe tires arising from the same accident as evidence of malice where defendant did not limit the use of the stipulated evidence and did not object to the instructions at trial.

3. Criminal Law § 1095 (NCI4th)— automobile accident—intoxication—second-degree murder—aggravating factor— risk of death by device hazardous to more than one person

The trial court did not err in a second-degree murder prosecution arising from an automobile accident by finding as an

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aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person. Although defendant contended that his use of a motor vehicle could not be used in aggravation because that use provided the inference of malice necessary for second-degree murder, it is the reckless and wanton nature of the act committed which leads to the inference of malice while the aggravating factor is supported by the use of a device normally hazardous to the lives of more than one person to create a risk of death to more than one person.

4. Criminal Law § 1095 (NCI4th Rev.)— second-degree murder—automobile accident—aggravating factor—position of trust and confidence

There was sufficient evidence of the aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense in a second-degree murder prosecution arising from the death of a twelve-year-old in a car accident while defendant was intoxicated. Even assuming that defendant's contention that the court's finding of a relationship of trust and confidence with the victim's mother and family is irrelevant and that the existence of the aggravating factor must be premised on a relationship of trust between defendant and the victim, that relationship existed here. Defendant also argued that any trust or confidence the child placed in him did not facilitate the offense in any way, but the fact that the child was in the car with defendant from the outset was predicated on his close relationship with defendant. Defendant's total disregard for the welfare of the child relates to his character and conduct and was reasonably related to the purposes of sentencing.

5. Criminal Law § 1097 (NCI4th Rev.)— second-degree murder—mitigating factors—acknowledgment of wrongdoing

The trial court did not err in a second-degree murder prosecution arising from an automobile accident by failing to find as a statutory mitigating factor that defendant voluntarily acknowledged wrongdoing where defendant was agitated and uncooperative with medical personnel at the accident scene; defendant repeatedly yelled that he wanted to get out of the police car at the accident scene; the first officer at the accident scene testified that he felt that defendant was going to run from him; defendant provided the necessary information to complete an accident

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report and indicated that he had not meant to harm the child but only wanted to scare the child's mother; and defendant failed to submit to a test to determine his blood alcohol concentration.

6. Criminal Law § 1097 (NCI4th Rev.)— second-degree murder—mitigating factors—mental or physical condition—alcoholism alone insufficient

The trial court did not abuse its discretion in a prosecution for second-degree murder resulting from defendant's operation of his vehicle while he was intoxicated by failing to find as a statutory mitigating factor that defendant suffered from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense. The existence of a condition such as alcoholism, without more, does not mandate consideration of this mitigating factor.

Judge MARTIN (John C) concurring in part and dissenting in part.

Appeal by defendant from judgment entered 5 June 1996 by Judge Marcus Johnson in Buncombe County Superior Court. Heard in the Court of Appeals 15 May 1997.

Michael F. Easley, Attorney General, by Reuben F. Young, Associate Attorney General, for the State.

Belser & Parke, P.A., by David G. Belser, for defendant-appellant.

WYNN, Judge.

A grand jury indicted defendant Jerry Wayne Ballard for, and he subsequently pled guilty to, felony driving while impaired, reckless driving to endanger, driving while license revoked, unsafe tires, fictitious registration card/tag, and operating a vehicle with no insurance. A grand jury also indicted defendant for second degree murder and he was tried by a jury in Buncombe County.

At that trial, the State's evidence tended to show the following: On 15 May 1995, defendant was seen with eleven year old Billy Joe Moore ("B.J.") at a convenience store in Weaverville, N.C. Deborah Moore, B.J.'s mother and defendant's ex-girlfriend, had planned for B.J. to stay with his grandmother that day. However, during the course of the day, B.J. called his mother from the convenience store to say he was not with his grandmother. Defendant came on the line

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and argued with and threatened Ms. Moore. Ms. Moore, aware that defendant was a heavy drinker and knowing from his slurred speech on the telephone that defendant was under the influence, repeatedly asked defendant to bring B.J. home. Following this telephone conversation, Ms. Moore called the police and reported that B.J. had been abducted and informed them of his location.

Defendant left the store with B.J. in his car at approximately 7:00 p.m. Shortly thereafter, Buncombe County Sheriff Deputy Jerry Owenby, Jr. spotted defendant's car and turned around to follow him in his patrol car. Defendant accelerated, passing a car on a double solid line into oncoming traffic, and sped off down the road. Defendant, with Deputy Sheriff Owenby in pursuit, ran a stop sign and collided with a utility pole about one mile from where the initial pursuit began. B.J. suffered severe head trauma and an amputated leg and died on the scene. Defendant told the investigating officer that he was driving the car but that he hadn't meant to wreck it. He asked about B.J. and said that he had not wanted to hurt B.J. but just wanted to scare B.J.'s mother. Police found numerous empty beer cans and two bottles of Wild Irish Rose wine in defendant's car. Defendant was admitted to the hospital where he refused a request for a blood sample and breathalyzer test. However, defendant stipulated that his blood alcohol level at a relevant time after the accident was .18.

Defendant presented the testimony of John Clement, an expert in psychology, who stated that defendant suffered from chronic alcoholism and poly-substance abuse and was suffering from drug and alcohol addiction and intoxication at the time of the accident. He further stated that defendant's state of mind immediately preceding the accident was frightened and panicked.

At the conclusion of the trial, the jury found defendant guilty of second degree murder. The trial court then determined that defendant had a prior record level of II and made findings of aggravating and mitigating factors. It found as factors in aggravation that "defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person," and "defendant took advantage of a position of trust or confidence to commit the offense," and found as a factor in mitigation that "defendant has a support system in the community." After concluding that the aggravating factors outweighed the mitigating factors, the court imposed an aggravated

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sentence of 163 to 205 months. Defendant appeals from the judgment and sentence imposed.

The defendant raises several issues on appeal: (I) Whether the trial court erred by refusing to allow the expert psychologist to testify as to what defendant told him regarding his state of mind at the time of the offense; (II) Whether the trial court committed plain error by instructing the jury that it could consider the defendant's guilty pleas to driving while license revoked, no insurance, fictitious tag and unsafe tires as evidence of malice; (III) Whether the trial court erred in finding the two aggravating factors and by failing to find two additional mitigating factors. We conclude that the defendant received a fair trial free from prejudicial error.

I.

[1] Defendant first assigns as error the trial court's refusal to allow his expert psychologist to testify as to what the defendant told him regarding his state of mind at the time of the offense. He argues that defendant's statements to the psychologist formed part of the basis for his expert opinion and as such, should have been allowed into evidence. We disagree.

Under N.C.R. of Evid. 705, an expert may testify regarding his opinion and the reasons therefor. However, this "does not . . . make the bases for an expert's opinion automatically admissible." *State v. Baldwin*, 330 N.C. 446, 456, 412 S.E.2d 31, 37 (1992). The trial court has the authority to " 'exercise reasonable control over the mode and order' of interrogation and presentation of the evidence," and has the discretion to exclude relevant but prejudicial evidence. *Id.* (quoting N.C.R. Evid. 611). Such an exercise of discretion will be reversed "only upon a showing that [the trial court's] ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Id.* (quoting *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986)).

In the instant case, the trial court allowed the expert to testify as to his opinion regarding defendant's state of mind at the time of the accident, but excluded the expert's hearsay testimony as to defendant's statements to him explaining his version of the events. The trial court reasoned:

[T]he defendant's exculpatory testimony or statements as to this particular event are prejudicial to the State, and the prejudicial effect at most would be only relevant as a basis for this witness's

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conclusions. And to the extent it might be helpful to the jury in so doing, it's outweighed by the prejudice to the State in being unable to cross-examine the defendant on those statements.

After examining the record, we find that the trial court did not abuse its discretion by excluding defendant's statements to the psychologist. *See Baldwin*, 330 N.C. at 457, 412 S.E.2d at 38.

II.

[2] Defendant next assigns as error a portion of the trial court's jury instructions. He contends that the trial court committed plain error by instructing the jury that it could consider the defendant's guilty pleas to driving while license revoked, no insurance, fictitious tag and unsafe tires as evidence of malice. We disagree.

Defendant stipulated that he pled guilty on 3 June 1996 to felony driving while impaired, driving while license revoked, reckless driving and endangerment to property and persons, operating a motor vehicle with unsafe tires, creating a needless hazard, having a fictitious registration plate, knowing the same to be stolen, and operating a motor vehicle without having financial responsibility or insurance. He further stipulated that his guilty pleas were to crimes which arose out of the death of B.J. Moore on 19 May 1995. Defendant did not limit the use of the stipulated evidence in any way. At the close of all the evidence, the trial court's instructions to the jury included the following:

Now, evidence has been received in this case which tends to show that the defendant, Mr. Ballard, was convicted of three separate counts of driving while impaired prior to May 19th of 1995, and that he plead "guilty" to driving while license revoked, no insurance, fictitious tag, and pled "responsible" to unsafe tires on June 3rd—on or about June 3rd of this year. Now, this evidence was received solely for the purpose of showing that the defendant, Mr. Ballard, at the time of the subject accident on or about May 19, 1995, had the malice which is a necessary element of second-degree murder which is charged in this case. If you believe this evidence, you may consider it, but only for the limited purpose for which it was received. It is for you, the jury to determine whether this evidence, in fact, shows malice, whether or not it, in fact, shows malice.

Defendant made no objection to this instruction at the time it was given and at the close of all the instructions responded to the judge's

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inquiry of whether there were any objections saying "No objections to any of the instructions." Having examined the record and the instructions in their entirety, we cannot say that any alleged defect in the instructions was "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 378, 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). Therefore, we hold that the instructions at issue did not constitute plain error.

III.

Finally, defendant assigns as error the trial court's finding of two aggravating factors, its failure to find two additional mitigating factors, and the sentence imposed based on these factors.

[3] Defendant first contends that the trial court erred by finding as an aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person. We disagree.

In *State v. Garcia-Lorenzo*, 110 N.C. App. 319, 430 S.E.2d 290 (1993), we held that, where defendant was legally intoxicated and driving recklessly, the automobile constituted a device knowingly used by defendant which created a great risk of death to more than one person. Moreover, in *State v. McBride*, 118 N.C. App. 316, 454 S.E.2d 840 (1995), we upheld the aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person when defendant was sentenced for involuntary manslaughter in connection with an automobile accident.

Nonetheless, defendant argues that his reckless use of a motor vehicle provided the necessary inference of malice, an essential element of the offense of second degree murder, and therefore, cannot be used as a factor in aggravation. In support of his position, defendant cites *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983) in which our Supreme Court stated:

When the facts justify the giving of the instruction of the inference of malice arising as a matter of law from the use of a deadly weapon and it is in fact given, or when it could have been given had defendant not entered a plea of guilty, evidence of the use of a deadly weapon is deemed necessary to prove the element of

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malice for purposes of precluding its use as an aggravating factor at sentencing.

Id. at 417, 306 S.E.3d at 788. However, we find the instant case distinguishable from *Blackwelder*.

In the case *sub judice*, no deadly weapon was employed and no inference of malice arises as a matter of law. Instead, the trial court instructed the jury with regard to the element of malice: "Malice is a necessary element which distinguishes second-degree murder from manslaughter. Malice arises when an act which is done so recklessly and wantonly as to manifest a mind utterly without regard to human life and social duty, and deliberately bent upon mischief." Thus, it is the reckless and wanton nature of the act committed which leads to the inference of malice. On the other hand, it is the use of a device, normally hazardous to the lives of more than one person, to create a risk of death to more than one person which supports the aggravating factor at issue. Therefore, we hold that the defendant's operation of the motor vehicle did not constitute one of the elements of second degree murder. Accordingly, we affirm the trial court's finding as an aggravating factor that defendant knowingly created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person.

[4] Defendant next contends that the trial court erred in finding as an aggravating factor that the defendant took advantage of a position of trust or confidence to commit the offense. We disagree.

The trial court stated:

I find that the defendant took advantage of a position of trust or confidence to commit the offense. That is, it would plainly appear that but for the position of trust and confidence that he held with the mother and family of this young boy, he would not have had the opportunity to gain custody of the child, so I find that as an aggravating factor.

Defendant first argues that the trial court's finding of fact that he had a relationship of trust and confidence with the victim's mother and family is irrelevant. Defendant cites *State v. Farlow*, 336 N.C. 534, 444 S.E.2d 913 (1994), in support of his contention that the issue should have been whether he had such a relationship *with the victim*. *Id.* at 542, 444 S.E.2d at 918 ("The existence of this aggravating factor is premised on a relationship of trust between defendant and the victim which causes the victim to rely upon defendant.").

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Assuming for the sake of argument that defendant's contention is correct, we would nonetheless find that a relationship of trust did exist between defendant and the victim. The record shows that defendant had a live-in relationship with Ms. Moore and her family, including her son B.J., for approximately a year, and that defendant developed a close relationship with the child. Ms. Moore testified that defendant still had contact with her son after their breakup, and defendant's own mother testified that defendant and B.J. were often together, playing, wrestling and talking.

Defendant also contends that even if a relationship of trust did exist between he and B.J., any trust or confidence the child placed in him did not facilitate the offense in any way. We disagree.

The law is well-settled that this aggravating factor may be grounded in the child's dependence on the defendant. *See State v. Holden*, 321 N.C. 689, 365 S.E.2d 626 (1988); *State v. Daniel*, 319 N.C. 308, 354 S.E.2d 216 (1987). In *Daniel*, the Supreme Court upheld a finding that the defendant took advantage of a position of trust or confidence with her newborn child when she murdered the child. The Court held that this aggravating factor does not require evidence of a conscious mental process on the part of the infant victim:

Such a finding depends instead upon the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other. A relationship of trust or confidence existed because defendant was the child's mother and because she was singularly responsible for its welfare. The abuse of her parental role relates to defendant's character and conduct and was reasonably related to the purposes of sentencing.

319 N.C. at 311, 354 S.E.2d at 218.

The defendant in this case contends that the crime would have been committed in the same way even if the child had been a total stranger. We disagree. The fact that the child was in the car with defendant from the outset was predicated on his close relationship with defendant. Defendant knew that the boy looked up to him as a father-figure, a protector; yet he still chose to get in the car with the child even though he was very drunk and then he drove the car in such a reckless manner that it crashed, killing the child. In the commission of this crime, the defendant's total disregard for the welfare of this child (who he was responsible for) relates, as in *Daniel*, "to defendant's character and conduct and was reasonably related to the

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purposes of sentencing.” Accordingly, we find the evidence sufficient to support this finding in aggravation.

[5] Defendant next contends that the trial court erred in failing to find as a statutory mitigating factor that the defendant voluntarily acknowledged wrongdoing in connection with the offense. Again, we disagree.

Our examination of the record reveals that at the accident scene defendant was agitated and uncooperative with medical personnel. He repeatedly yelled that he wanted to get out of the car and Deputy Sheriff Jerry Dean Owenby, Jr., the first officer at the accident scene, testified that he felt like the defendant was going to run from him. Trooper Neil Denman with the North Carolina Highway Patrol spoke with defendant in the hospital as part of his investigation of the accident. Trooper Denman testified that defendant gave him the necessary information to complete the accident report, i.e., name, address, date of birth, etc., and told him that he didn’t mean to wreck the car and harm the child and that he just wanted to take the child to scare the mother. Defendant refused to give a blood sample for chemical testing to determine his blood alcohol concentration. We hold that, under these circumstances, the trial court did not err in failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing in connection with the offense.

[6] Finally, the defendant contends that the trial court erred in failing to find as a statutory mitigating factor that the defendant was suffering from a mental or physical condition that was insufficient to constitute a defense, but significantly reduced his culpability for the offense. We disagree.

In *State v. Salters*, 65 N.C. App. 31, 308 S.E.2d 512 (1983), *disc. review denied*, 310 N.C. 479, 312 S.E.2d 889 (1984), we said:

While a mental or physical condition, such as alcoholism, may be capable of reducing a defendant’s culpability for an offense, evidence that the condition exists, without more, does not mandate consideration as a mitigating factor. Defendant has the burden of proof with respect to any alleged mitigating factors.

Id. at 36, 308 S.E.2d at 516 (citations omitted). After examining the record, we hold that the trial court did not abuse its discretion in failing to find this mitigating factor under the circumstances of the instant case.

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For the foregoing reasons, we hold that the defendant received a fair trial, free from prejudicial error.

No prejudicial error.

Judge LEWIS concurs.

Judge MARTIN, John C., concurs in part, and dissents in part.

Judge John C. MARTIN concurring in part and dissenting in part.

I concur fully with the majority in finding no prejudicial error in defendant's trial. I also concur in those portions of the majority opinion which affirm the trial court's finding, in aggravation of punishment, of the aggravating factor contained in G.S. § 15A-1340.16(d)(8), and the trial court's refusal to find, in mitigation, the mitigating factors contained in G.S. § 15A-1340.16(e)(3) and G.S. § 15A-1340.16(e)(15). However, I must respectfully dissent from that portion of the majority opinion which affirms the trial court's finding of the aggravating factor contained in G.S. § 15A-1340.16(d)(15) that "defendant took advantage of a position of trust or confidence to commit the offense."

The State has the burden to prove by a preponderance of the evidence the existence of factors in aggravation of punishment. N.C. Gen. Stat. § 15A-1340.16(a); *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991). Here, the trial court found:

I find that the defendant took advantage of a position of trust or confidence to commit the offense. That is, it would plainly appear that but for the position of trust and confidence that he held with the mother and family of this young boy, he would not have had the opportunity to gain custody of the child, so I find that as an aggravating factor.

However, the record contains no evidence as to how the child came to be in the company of defendant on the date of the offense, and therefore, does not support the trial court's finding that defendant gained custody of the victim by reason of a relationship between himself and the child's mother and family. Moreover, the majority's reasoning that "[t]he fact that the child was in the car with defendant from the outset was predicated on his close relationship with defend-

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ant” is purely speculative; there was no evidence to show whether the child’s presence in defendant’s car was voluntary or involuntary.

Where a trial court finds an improper aggravating factor, it cannot properly balance the aggravating and mitigating factors; in such instances the case must be remanded for resentencing. *State v. Whitley*, 111 N.C. App. 916, 433 S.E.2d 826 (1993). Therefore, I vote to find no prejudicial error in defendant’s trial, but to remand the case to the Superior Court of Buncombe County for a new sentencing hearing.



SOUTHERN BUILDING MAINTENANCE, INC., PLAINTIFF V.
GREGORY CARL OSBORNE, DEFENDANT

No. COA96-993

(Filed 2 September 1997)

1. Labor and Employment § 89 (NCI4th)— covenant not to compete—settlement agreement—damages for breach

The evidence supported the trial court’s finding that plaintiff janitorial service suffered damages (lost profits) in the amount of \$3,750.00 as a direct and proximate result of defendant former manager’s breach of a covenant not to compete and a settlement agreement with plaintiff in which defendant agreed not to solicit plaintiff’s customers.

2. Unfair Competition or Trade Practices § 49 (NCI4th)— covenant not to compete—violation of settlement agreement—unfair and deceptive practice—treble damages

Defendant former manager’s violation of a settlement agreement with regard to breach of a covenant not to compete constituted an unfair and deceptive practice which entitled plaintiff janitorial service to treble damages (lost profits) under N.C.G.S. § 75-16 where defendant’s actions in contacting several of plaintiff’s current clients to solicit maintenance business away from plaintiff during negotiation of the settlement agreement and after its execution disclosed more than a simple breach of contract and showed an intentional deception by defendant in dealing with plaintiff.

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3. Unfair Competition or Trade Practices § 51 (NCI4th)—prevailing party—denial of attorney's fees—no misapprehension of authority—no abuse of discretion

The trial court did not abuse its discretion in refusing to award attorney's fees to the prevailing plaintiff in an unfair and deceptive practice action arising from a violation of a covenant not to compete and a settlement agreement where adequate evidence supported the trial court's finding that there was no unwarranted refusal by defendant to fully resolve the matter, and the record is devoid of any evidence that the trial court labored under any misapprehension that it did not have authority to award plaintiff attorney's fees. N.C.G.S. § 75-16.1

Appeal by defendant from judgment entered 1 March 1996 and appeal by plaintiff from order entered 25 June 1996, by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 24 April 1997.

Adams Kleemeier Hagan Hannah & Fouts, P.L.L.C., by J. Alexander S. Barrett and Benjamin A. Kahn, for plaintiff-appellee.

Gordon & Johnston, by Robert L. Johnston, for defendant-appellant.

TIMMONS-GOODSON, Judge.

This action arises out of the breach of a covenant not to compete provision contained in an employment contract executed in January 1989 between defendant Gregory Carl Osborne and plaintiff Southern Building Maintenance, Inc. Upon defendant's breach of the contract's covenant not to compete, the parties executed a settlement agreement on 17 March 1994. Defendant subsequently violated the 17 March 1994 settlement agreement and plaintiff instituted this action on 28 July 1994 in Guilford County Superior Court, seeking an injunction and damages against defendant.

On 29 July 1994, plaintiff filed a motion for preliminary injunction, seeking to enjoin defendant from further violation of the 17 March 1994 settlement agreement. Thereafter, on 14 September 1994, the parties entered into a consent order, which permanently enjoined further violation of the settlement agreement. This matter came on for hearing before Judge Catherine C. Eagles, during the 22 January

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1996 civil session of Guilford County Superior Court. The evidence presented was as follows.

Plaintiff corporation is in the business of providing commercial janitorial services. In January 1989, defendant was hired by plaintiff corporation as a manager with its Greensboro offices. Defendant was responsible for calling on customers and potential customers, submitting proposals or bids on potential jobs, staffing cleaning jobs, and handling any problems or complaints from customers. In the course of his employment, defendant became familiar with plaintiff's customers, pricing practices, costs, and charges for services rendered. At the time that defendant was hired, defendant signed an employment contract which contained a covenant not to compete with plaintiff.

On 15 January 1994, defendant was terminated from employment with plaintiff. As of that date, Soabar, Inc. and Rexham Corporation were plaintiff's customers. Prior to his termination, plaintiff through defendant, submitted a proposal to Soabar for janitorial services. This proposal had not been accepted nor rejected by Soabar as of the date of defendant's termination of employment.

Soon after defendant's termination from plaintiff corporation, defendant started his own cleaning business, 21st Century Building Services. Defendant's primary customers were residential and small commercial accounts. Defendant, however, was open to servicing plaintiff's "former" clients, once these clients terminated their relationship with plaintiff. Defendant testified that representatives of Soabar and Rexham had contacted him and indicated that they had terminated their contracts and/or decided not to contract with plaintiff corporation. As a result, defendant submitted proposals, and subsequently, began to perform janitorial services for both corporations.

When plaintiff learned of defendant's activities, plaintiff contacted defendant and demanded that he cease competition with plaintiff corporation, as required by the subject non-compete clause. Consequently, the parties, through counsel, negotiated a settlement agreement. This agreement allowed defendant to continue to perform work for plaintiff's former clients, Rexham and Soabar, but required defendant to compensate plaintiff for its lost profits due to his breach of the non-compete clause. The settlement agreement also allowed defendant to operate a cleaning service which performed residential and small commercial jobs, as well as other specifically listed types

of cleaning in which plaintiff corporation did not engage. The settlement agreement, however, provided that defendant would not do as follows:

Call upon or cause to be called upon, solicit or assist in the solicitation of any person, firm, association, or corporation, that is a customer or account of the Company [(Southern)] or any subsidiary or affiliate thereof on the date of this Agreement.

The agreement further provided that he would not do the following:

Own any interest in, manage, operate, control, be employed by, render advisory services to, or participate in the operation, management or control of any business that provides commercial cleaning, maintenance and other janitorial services in competition with the Company [(Southern)] . . . within [a specified geographical area, including Guilford County].

Finally, the settlement agreement provided that the covenants not to compete therein would expire on 14 November 1994.

Despite the provisions of the settlement agreement, defendant contacted some of plaintiff's customers during the agreement's negotiations, including Ecoflo. Particularly, in a letter to Ecoflo, mailed on 22 February 1994, plaintiff indicated:

I will soon enter into an agreement with Southern Building Maintenance Company that will prevent me from initiating any contact with you relative to commercial janitorial service until November 14, 1994.

. . .

During the term of the impending agreement, I will not initiate contact with you for commercial janitorial services. However, if in the course of your business relationship with my previous employer you should independently choose to terminate that relationship, I would covet the opportunity to submit a professional and competitive proposal for fulfilling your custodial needs. In fact, we have the staff and equipment in stock to start most accounts on 24-hour notice.

Plaintiff and defendant signed the settlement agreement on 17 March 1994. Defendant contacted Ecoflo at least once after the execution of the settlement agreement, emphasizing the fact that he could not work for Ecoflo unless the company terminated its contract with plaintiff corporation and referring to the 22 February 1994 letter pre-

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viously mailed to Ecoflo. Thereafter, on 19 April 1994, Ecoflo informed plaintiff that it was terminating plaintiff corporation's janitorial services effective 18 May 1994. Notably, prior to this date, defendant had provided Ecoflo with a verbal proposal for his janitorial services. Subsequently, Ecoflo terminated its contract with plaintiff for janitorial services on 5 May 1994 and immediately retained the services of defendant's company.

After hearing all of the evidence and arguments of counsel, Judge Eagles entered judgment on 1 March 1996, finding defendant liable to plaintiff for damages in the amount of \$3,750.00, and trebling those damages pursuant to section 75-16 of the North Carolina General Statutes. In the judgment, Judge Eagles also held that plaintiff was entitled to "reasonable expenses, including attorney's fees, in an amount to be set by further Order of this [c]ourt[.]" after the submission of affidavits by the parties in support of or in opposition to an award of such expenses. On 7 March 1996, defendant filed an objection to the trial court's award of attorney's fees; and after a hearing on the objection, the trial court entered an order denying plaintiff attorney's fees. Defendant appeals from the 1 March 1996 judgment awarding plaintiff treble damages for his breach of contract; and plaintiff appeals the 25 June 1996 order denying plaintiff corporation attorney's fees. For the reasons discussed herein, we affirm both the 1 March 1996 judgment and the 25 June 1996 order of the trial court.

[1] Defendant first argues on appeal that the trial court erred in finding that plaintiff had suffered damages in the amount of \$3,750.00 as a direct and proximate result of his breach of the 17 March 1994 settlement agreement. We cannot agree.

A trial judge, sitting without a jury, acts as fact finder and weigher of evidence. Accordingly, if his/her findings are supported by competent evidence, they are binding on appeal, although there may be evidence that may support findings to the contrary. *Taylor v. Volvo North American Corp.*, 339 N.C. 238, 247, 451 S.E.2d 618, 622 (1994).

The trial court's authority to award damages in a breach of contract action is well established. It is also well established that "[d]amages for breach of contract may include loss of prospective profits where the loss is the natural and proximate result of the breach." *Mosley & Mosley Builders v. Landin Ltd.*, 87 N.C. App. 438, 446, 361 S.E.2d 608, 613 (1987) (citing *Perkins v. Langdon*, 237 N.C. 159, 74 S.E.2d 634 (1953)), *cert. dismissed*, 322 N.C. 607, 370 S.E.2d

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416 (1988), *quoted in McNamara v. Wilmington Mall Realty Corp.*, 121 N.C. App. 400, 407, 466 S.E.2d 324, 329 (1996). The party claiming these damages bears the burden of proving its losses with "reasonable certainty." *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 546, 356 S.E.2d 578, 585, *reh'g denied*, 320 N.C. 639, 360 S.E.2d 92 (1987). That party must show "that the amount of damages is based upon a standard that will allow the finder of fact to calculate the amount of damages with reasonable certainty." *Id.* at 547-48, 356 S.E.2d at 586. While the reasonable certainty standard requires something more than "hypothetical or speculative forecasts," it does not require absolute certainty. *McNamara*, 121 N.C. App. at 407-08, 466 S.E.2d at 329 (citing *Mosley*, 87 N.C. App. at 446, 361 S.E.2d at 613); *Weyerhaeuser Co. v. Supply Co.*, 292 N.C. 557, 561, 234 S.E.2d 605, 607 (1977)).

In the instant action, the trial court had before it evidence which tended to show that in spite of and in derogation of the non-compete clause in his employment contract with plaintiff, defendant solicited the business of plaintiff's former clients. Upon this breach, a settlement agreement was subsequently executed wherein defendant was permitted to continue to provide services to plaintiff's former clients, but was required to pay plaintiff the lost profits resulting from his breach. Therein, defendant agreed that he would not contact or solicit the business of any other of plaintiff's clients. Ultimately, however, defendant breached the settlement agreement and contacted various clients serviced by plaintiff, including Ecoflo.

On 22 February 1994, during negotiations of the settlement agreement, defendant wrote a letter to a representative of Ecoflo, noting that he was negotiating an agreement that would preclude him from contacting Ecoflo about providing the company with commercial janitorial services. This letter also indicated his willingness and readiness to provide such service "if [Ecoflo] should independently choose to terminate [its] relationship [with plaintiff]." Thereafter, Ecoflo terminated its contract with plaintiff, and immediately hired defendant's company to provide commercial janitorial services to the company. While Ecoflo's representative testified that Ecoflo terminated its contract with plaintiff due to dissatisfaction with plaintiff's service, the record is rife with evidence that supports the trial court's finding that Ecoflo's action in terminating its contract with plaintiff was done "at least in part, [due to] the availability of services from [defendant's] company."

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Further, there was evidence presented by plaintiff corporation which tended to show that prior to terminating its contract, plaintiff was charging Ecoflo for its services in the amount of \$1,576.00 per month; and that after deductions for labor costs and other expenses, plaintiff realized a gross profit in the amount of \$592.00 per month on this account—for a total loss in gross profits of \$3,749.00 from the period of 4 May to 14 November 1994. Defendant argues, however, that these figures are incorrect as (1) the \$1,576.00 monthly charge for plaintiff's janitorial services represents a "new price" that was never accepted by Ecoflo; and (2) the \$592.00 per month and \$3,749.00 total figures for loss of gross profit were incorrect as plaintiff failed to deduct any of its non-direct overhead costs from those figures. Defendant ignores the fact that plaintiff corporation's president, James Ray, testified that the corporation's profits would have "definitely and affirmatively . . . been \$592 more than [they were]"; and that plaintiff corporation did not save any non-direct costs by the loss of the Ecoflo account.

Accordingly, we find that the trial court had before it adequate evidence showing that to a "reasonable certainty," plaintiff had suffered loss of profits in the amount of \$3,750.00. As there was plenary evidence from which a fact finder could determine that as a direct and proximate result of defendant's breach of the 17 March 1994 settlement agreement, plaintiff suffered damages (a loss of profits) in the amount of \$3,750.00, we find no error in the trial court's finding in this regard; and defendant's argument to the contrary must fail.

[2] Defendant next argues that the trial court erred in trebling plaintiff's damages under North Carolina General Statutes section 75-16. We do not agree.

Section 75-16 of the General Statutes provides a business injured by another person in violation of Chapter 75 with a right of action, and recovery of treble damages for such injury. N.C. Gen. Stat. § 75-16 (1994). In order to prevail in an action for unfair and deceptive trade practices under Chapter 75, the claimant must show that (1) the acts or practices in question are "in or affecting commerce"; (2) the acts or practices in question had the capacity or tendency to deceive or were unfair; and (3) the claimant suffered actual injury as a proximate result of the other party's acts or practices. *In re Kittrell*, 115 B.R. 873 (Bankr. M.D.N.C. 1990). Once the fact finder determines whether a party committed certain acts and whether those acts had a causal connection to the claimant's injury, the court as a matter of law may determine whether these acts do indeed constitute unfair

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and deceptive practices in violation of Chapter 75. *La Notte, Inc. v. New Way Gourmet, Inc.*, 83 N.C. App. 480, 350 S.E.2d 889 (1986), *appeal dismissed and cert. denied*, 319 N.C. 459, 354 S.E.2d 888 (1987). A mere breach of contract does not constitute an unfair or deceptive trade practice. *Coble v. Richardson Corp.*, 71 N.C. App. 511, 322 S.E.2d 817 (1984). However, when a breaching party to a contract engages in a practice which “offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers[,]” an action under Chapter 75 can be maintained. *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981); *see also United Roasters, Inc. v. Colgate-Palmolive Co.*, 649 F.2d 985 (4th Cir.), *cert. denied*, 454 U.S. 1054, 70 L. Ed. 2d 590 (1981). Similarly, a Chapter 75 action can be maintained where the breaching party to a contract “engages in conduct that amounts to an inequitable assertion of its power or position.” *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 700, 303 S.E.2d 565, 569, *disc. review denied*, 309 N.C. 321, 307 S.E.2d 164 (1983). The record in the case *sub judice* discloses more than the simple breach of contract militated by defendant. Indeed, the facts show intentional deception in dealing with plaintiff. First, in spite of a covenant not to compete in his employment contract with plaintiff, defendant contacted several of plaintiff’s “former” clients. Further, during negotiations of the 17 March 1994 settlement agreement, defendant, in direct contravention of its provisions, contacted several of plaintiff’s current clients. Defendant emphasized his availability to provide janitorial services to these clients *if* they should terminate plaintiff’s services. As former manager of plaintiff’s Greensboro office, defendant had gained access to plaintiff’s clients and developed credibility with those clients. Defendant took advantage of this position in competing with plaintiff. The trial court found, and we agree, that such actions have the requisite causal connection to plaintiff’s lost profits and that these actions are unfair and deceptive trade practices within the meaning of Chapter 75. This argument, therefore, must fail.

[3] On appeal, plaintiff assigns as error the trial court’s failure to award attorney’s fees to plaintiff corporation pursuant to section 75-16.1 of the General Statutes. Specifically, plaintiff contends that the trial court labored under a mistaken impression that it did not have the authority to exercise its discretion to award attorney’s fees to plaintiff in the instant action; and that the evidence did indeed support a finding that defendant unreasonably refused to resolve this matter. We cannot agree.

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Section 16.1 of the General Statutes provides:

In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

- (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit[.]

N.C. Gen. Stat. § 75-16.1 (1994). An award or denial of attorney's fees under this section, even where supporting facts exist, is within the sound discretion of the trial court. *McDonald v. Scarboro*, 91 N.C. App. 13, 370 S.E.2d 680, *disc. review denied*, 323 N.C. 476, 373 S.E.2d 864 (1988).

In the case presently before us, the trial court, in its 1 March 1996 judgment, awarded plaintiff attorney's fees. However, upon objection of defendant, the trial court reconsidered this award. Consequently, the trial court entered an order denying plaintiff attorney's fees as "[t]here was no evidence presented that there was an unwarranted refusal by . . . defendant to fully resolve th[is] matter."

The record is devoid of any evidence that the trial court labored under any misapprehension that it did not have authority to award plaintiff attorney's fees as plaintiff contends. Indeed, the trial court, upon examining all of the evidence before it, decided that there was no evidence that defendant wilfully refused to fully resolve this matter; and as such, plaintiff was not entitled to attorney's fees. As there was adequate evidence to support the trial court's finding, that finding is binding upon this Court on appeal. Finding no abuse of discretion, the trial court's 25 June 1996 order denying plaintiff attorney's fees is affirmed.

In light of all of the foregoing, the 1 March 1996 judgment of the trial court is affirmed; and the 25 June 1996 order denying plaintiff attorney's fees is affirmed.

Affirmed.

Judges GREENE and WYNN concur.

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[127 N.C. App. 336 (1997)]

JOHN THOMAS MEEHAN, PLAINTIFF V. DOROTHY ANN CABLE AND
K. REID BERGLUND, TRUSTEE, DEFENDANTS

No. COA96-1335

(Filed 2 September 1997)

1. Mortgages and Deeds of Trust § 65 (NCI4th)— foreclosure hearing—injunction—jurisdiction of Superior Court

The trial court erred by concluding that it lacked jurisdiction to hear claims arising from a foreclosure and that the claims were properly addressed before the clerk of court in the foreclosure proceeding where plaintiff argued in his complaints that the foreclosure should be enjoined because he was not in default and that allowing the foreclosure to proceed without an accurate accounting would force him to pay defendants more than they are due in order to prevent a sale of the property. If proven, these claims might be the basis for an injunction against foreclosure and are within the jurisdiction of the superior court pursuant to N.C.G.S. § 45-21.34.

2. Courts § 63 (NCI4th)— federal Fair Debt Collection Practices Act—equitable remedies—jurisdiction

The trial court did not err by dismissing plaintiff's claim under the federal Fair Debt Collection Practices Act, 15 U.S.C.A. § 1692 for lack of jurisdiction. N.C.G.S. § 7A-243 provides that the Superior Court is the proper division for a trial in a civil action where the amount in controversy exceeds \$10,000 and damages under 15 U.S.C.A. § 1692 are limited to \$1,000 per proceeding. Plaintiff's only other claims were for the equitable remedies of injunction and accounting.

3. Judgments § 207 (NCI4th)— foreclosure hearing—equitable defenses—res judicata—collateral estoppel—issues not litigated

The trial court improperly concluded that defendant's equitable defenses to foreclosure were precluded under the doctrines of res judicata and collateral estoppel where defendant raised the equitable defenses at the foreclosure hearing. It is well established that a clerk of court is without jurisdiction to consider equitable defenses in a foreclosure hearing pursuant to N.C.G.S. § 45-21.16 and the elements of collateral estoppel are not met where the court adjudicating the prior proceeding lacked juris-

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diction over an issue. Res judicata requires the same claims as the prior action and plaintiff's claims for an injunction pursuant to N.C.G.S. § 45-21.34 are not claims which could have been brought in the prior action under § 21.16.

Judge COZORT dissenting.

Appeal by plaintiffs from order entered 26 July 1996 by Judge James U. Downs in Macon County Superior Court. Heard in the Court of Appeals 3 June 1997.

Jones, Key, Melvin, & Patton, P.A., by Richard Melvin, for plaintiff-appellant.

Creighton W. Sossomon for defendant-appellee.

TIMMONS-GOODSON, Judge.

On 27 August 1985, plaintiff John Thomas Meehan purchased a tract of land with a summer house in Highlands, North Carolina from defendant Dorothy Ann Cable. To secure the unpaid portion of the purchase price, plaintiff executed a purchase money note and deed of trust providing for annual payments to be applied first toward the interest and the remainder toward the principal. Plaintiff made inconsistent payments until 9 August 1993, at which point defendants filed a petition to foreclose and gave notice of a hearing pursuant to North Carolina General Statutes section 45-21.16. The petition was granted by the clerk of superior court, upheld by the superior court on appeal *de novo*, and again upheld on appeal to this Court. To prevent foreclosure, plaintiff was required to deposit with the clerk of superior court a sum representing the amount due under the note as alleged by defendants.

In a separate action pursuant to North Carolina General Statutes section 45-21.34, plaintiff filed a complaint in the Superior Court of Macon County alleging that defendants had demanded payment in excess of the amount owed, seeking to enjoin the foreclosure proceedings, and requesting a proper accounting. Plaintiff subsequently filed two amended complaints in which he claimed, in pertinent part, that he was not in default; that his account was entitled to certain credits; that defendants' actions were in violation of the federal "Fair Debt Collection Practices Act," 15 U.S.C.A. § 1692 (1982); that defendants were barred by principles of waiver and estoppel from either claiming default or accelerating payments; and that defendants had anticipatorily breached the terms of the note.

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After hearing the arguments of both parties and examining the evidence, the trial court dismissed all of the claims alleged in the original complaint for lack of jurisdiction, stating that they were “properly before the Clerk of Superior Court as part of the foreclosure proceeding.” In addition, the trial court dismissed plaintiff’s claim under the federal “Fair Debt Collection Practices Act” for lack of jurisdiction. With regard to plaintiff’s first amended complaint, the trial court dismissed the claims therein for lack of jurisdiction as well. Finally, the trial court dismissed all claims made in plaintiff’s second amended complaint based on defendants’ plea of *res judicata* and collateral estoppel. Plaintiff appeals.

[1] Plaintiff’s first assignment of error is that the trial court erred in dismissing his claims based on lack of jurisdiction. We agree and remand this action to the superior court.

North Carolina General Statutes section 45-21.34 provides that:

Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to enjoin such sale, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, *or upon any other legal or equitable ground which the court may deem sufficient.* . . .

N.C. Gen. Stat. § 45-21.34 (1996) (emphasis added). Moreover, the notice and hearing provided for under North Carolina General Statutes section 45-21.16

were designed to enable the mortgagor to utilize the injunctive relief already available in G.S. 45-21.34. The hearing was not intended to settle all matters in controversy between mortgagor and mortgagee, nor was it designed to provide a second procedure for invoking equitable relief.

In re Watts, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978). “The proper method for invoking equitable jurisdiction to enjoin a foreclosure sale is by bringing an action in the Superior Court pursuant to G.S. 45-21.34.” *Id.* (citations omitted); *see also Golf Vistas v. Mortgage Investors*, 39 N.C. App. 230, 249 S.E.2d 815 (1978). In *Golf Vistas*, a case similar to the present case, this Court held that, after a foreclosure proceeding had been initiated by special hearing under

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section 45-21.16, plaintiff was entitled to pursue claims that there was no default and that part of the property had been released from the deed of trust in a civil action to enjoin the foreclosure under section 45-21.34. 39 N.C. App. 230, 249 S.E.2d 815.

In the case *sub judice*, plaintiff argues in his original and first amended complaints that the foreclosure should be enjoined because he is not in default, and that allowing the foreclosure to proceed without an accurate accounting would force plaintiff to pay defendants more than they are due, in order to prevent a sale of the property. We find that these claims, if proven, might be a basis for an injunction against foreclosure and, as such, are within the jurisdiction of the superior court in an action pursuant to North Carolina General Statutes section 45-21.34. Accordingly, the trial court erred in concluding that it lacked jurisdiction to hear these claims and that they were properly addressed before the clerk of court in the foreclosure proceeding.

[2] In his second assignment of error, plaintiff argues that the trial court erred in dismissing his claim under the federal "Fair Debt Collection Practices Act," 15 U.S.C.A. § 1692, for lack of jurisdiction. We disagree.

North Carolina General Statutes section 7A-243 provides that the superior court is the proper division for trial in a civil action where the amount in controversy exceeds \$10,000. N.C. Gen. Stat. § 7A-243 (1995). However, under 15 U.S.C.A. § 1692, statutory damages are limited to \$1,000 per proceeding. 15 U.S.C.A. § 1692k(a)(2)(A). Accordingly, as plaintiff's only other claims were for the equitable remedies of injunction and accounting, the trial court correctly determined that it was without jurisdiction to hear the claim.

[3] In his final assignment of error, plaintiff argues that the trial court erred in dismissing his second amended complaint based on the doctrines of res judicata and collateral estoppel. We agree and hold that these issues should be remanded to the court below for consideration on the merits.

First, we note that the issue is properly one of collateral estoppel, not res judicata. Res judicata applies only when the present action involves the same parties and the same claims as the prior action; whereas, collateral estoppel may apply where the same parties appear with different claims. See *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 398 S.E.2d 628 (1990),

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disc. review denied, 328 N.C. 570, 403 S.E.2d 509 (1991). As we have already noted, plaintiff's claims for an injunction pursuant to section 45-21.34 of the General Statutes are not claims which could have been brought in the prior action under section 45-21.16 and, thus, are different claims for purposes of res judicata.

The elements of collateral estoppel, as stated by our Supreme Court, are as follows: (1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined. *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986). Moreover, this Court has recently held that where the court adjudicating the prior proceeding lacked jurisdiction over an issue, the third element of collateral estoppel has not been met. *Alt v. John Umstead Hospital*, 125 N.C. App. 193, 479 S.E.2d 800, *disc. review denied*, 345 N.C. 639, 483 S.E.2d 702 (1997); *see also In re Canal Co.*, 234 N.C. 374, 377, 67 S.E.2d 276, 278 (1951) (noting that “[a] judgment entered by a clerk of the Superior Court in a special proceeding *in which such clerk had jurisdiction*, will stand as a judgment of the court. . . .” (emphasis added)).

It is well established that a clerk of court is without jurisdiction to consider equitable defenses in a foreclosure hearing pursuant to section 45-21.16 of the General Statutes.

According to G.S. 45-21.16, . . . there are only four issues before the clerk at a foreclosure hearing: the existence of a valid debt of which the party seeking to foreclose is the holder, the existence of default, the trustee's right to foreclose, and the sufficiency of notice to the record owners of the hearing. . . . (The) judge has no equitable jurisdiction and cannot enjoin foreclosure upon any ground other than the ones stated in G.S. 45-21.16.

In re Foreclosure of Deed of Trust, 55 N.C. App. 68, 71-72, 284 S.E.2d 553, 555 (1981), *disc. review denied*, 305 N.C. 300, 291 S.E.2d 149 (1982) (citations omitted). “Equitable defenses to foreclosure, *such as waiver* of the right to prompt payment through acceptance of late payments, *may not* be raised in a hearing pursuant to N.C.G.S. § 45-21.16 or on appeal therefrom but must be asserted in an action to enjoin the foreclosure sale under N.C.G.S. § 45-21.34.” *In re Foreclosure of Goforth Properties, Inc.*, 334 N.C. 369, 374, 432 S.E.2d 855, 859 (1993) (emphasis added); *see also In re Foreclosure of Fortescue*, 75 N.C. App. 127, 330 S.E.2d 219 (1985) (holding that

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respondent's argument on waiver was not properly addressed in an action pursuant to section 45-21.16, but must be pursued in an action under section 45-21.34). In the foreclosure hearing in the instant case, to the extent that such arguments were made before the clerk of court, or before the superior court upon appeal *de novo*, the issues raised by plaintiff were not "actually litigated" or "necessary to the judgment" as required for collateral estoppel.

In light of the foregoing, we affirm the decision of the superior court with regard to lack of jurisdiction over plaintiff's claim under 15 U.S.C.A. § 1692. However, we reverse the superior court's decision and remand this case for a hearing on plaintiff's requests for an injunction and accounting, and for consideration of plaintiff's equitable claims of waiver, estoppel, substitution and novation.

Affirm in part; reverse and remand in part.

Judge MARTIN, Mark D., concurs.

Judge COZORT dissents.

Judge COZORT dissented prior to 31 July 1997.

Judge COZORT dissenting.

I vote to dismiss plaintiff's appeal.

Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure states, in part: "Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C.R. App. P. 10(c)(1) (1997).

Plaintiff's assignments of error state:

Plaintiff/Appellant, John Thomas Meehan respectfully assigns the following errors:

1. Paragraph 1 of the Order of the Honorable James U. Downs dated July 25, 1996.

EXCEPTION No. 1, R. p. 20

2. Paragraph 2 of the Order of the Honorable James U. Downs dated July 25, 1996.

EXCEPTION No. 2, R. p. 20

IN THE COURT OF APPEALS
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3. Paragraph 3 of the Order of the Honorable James U. Downs dated July 25, 1996.

EXCEPTION No. 3, R. p. 21.

These assignments of error completely fail to state any "legal basis upon which error is assigned." Failure to follow the Rules of Appellate Procedure regarding the form of assignments of error subjects an appeal to dismissal. *Bustle v. Rice*, 116 N.C. App. 658, 449 S.E.2d 10 (1994); *State v. Thomas*, 332 N.C. 544, 423 S.E.2d 75 (1992). Our rules were not written to be ignored by the parties or this Court. This appeal should be dismissed.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. OSCAR GENE COLEMAN, III
AND WIFE, VICTORIA A. COLEMAN, DEFENDANTS

No. COA96-1233

(Filed 2 September 1997)

Evidence and Witnesses § 572 (NCI4th)— property condemnation—damages—duty to mitigate—activities of property owners—admissible

In an action to determine compensation for property condemned by the Department of Transportation, the trial court properly allowed evidence of defendant property owners' transactions and activities prior to the condemnation date. Evidence that defendants engaged in conduct for the sole purpose of increasing their damages was relevant and admissible under N.C.G.S. § 8C-1, Rule 404(b); furthermore, defendants' duty to mitigate included the avoidance of conduct which would increase their damages.

Judge GREENE dissenting.

Appeal by defendants from judgment dated 15 May 1996 by Judge James C. Davis in Cabarrus County Superior Court. Heard in the Court of Appeals 1 May 1997.

Attorney General Michael F. Easley, by Assistant Attorney General W. Richard Moore, for plaintiff-appellee.

Wesley B. Grant, P.A., by Wesley B. Grant for defendants-appellants

DEPT. OF TRANSPORTATION v. COLEMAN

[127 N.C. App. 342 (1997)]

WYNN, Judge.

This appeal arises from a proceeding initiated by the Department of Transportation (DOT) to condemn for highway purposes 0.22 acres of a 1.01 acre tract of land owned by Oscar Gene Coleman, III and Victoria A. Coleman. The Colemans, apparently dissatisfied by a jury award of \$39,417.50 for just compensation, allege on appeal that the trial court erred by allowing evidence that tended to show that the Colemans made improvements on the tract to enhance their condemnation damages. We find no error.

On 5 February 1993, the Colemans purchased for \$35,000 the 1.01 acre tract. About two and a half months later, on 26 April 1993, DOT, through its agent, Wade McSwain, contacted the Colemans. McSwain stated that he told the Colemans "how close [the right of way] would come to [their] house" and that he would "order [an] appraisal [of the property but] could not discuss any monetary damages . . . [and] would get back with them later . . . with an offer." He also showed them the "actual highway plans" which showed that 0.22 acres facing the road of the Coleman tract (approximately fifty feet) would be needed for the highway project.

At the time McSwain contacted the Colemans, a vacant rental house, apparently in need of extensive repair, sat upon the 1.01 acre tract of land. Although the house was not within the area to be acquired by DOT, the only septic tank system on the Coleman tract was located on the portion of land that DOT sought to acquire. On 9 August 1993, DOT first appraised the Colemans' tract. On 11 August 1993, DOT also obtained an assessment that revealed that the remaining .79 acres of the parcel could not sustain a replacement septic system for the rental house.

On 24 September 1993, the Colemans purchased 2.29 acres of property adjoining the rear of their 1.01 acre tract. On learning of this acquisition, in early November 1993, McSwain told the Colemans that their property would need to be appraised again to include this additional lot and to determine if a replacement septic system might be installed somewhere on the 2.29 acres. In response, Mr. Coleman then told McSwain "that he was going to take the property" and "sell it and have it deeded—it would be out of . . . his name, that he had no intention of keeping it, and that would be done immediately." A few days later, the Colemans transferred the property to Mr. Coleman's parents by a deed dated 11 November 1993.

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Sometime after the August 1993 appraisal and assessment, but prior to the date (28 June 1994) of the condemnation of the property, the Colemans made extensive renovations to the rental house on the Coleman tract at a cost of approximately \$35,000 including: adding a second bathroom, installing a new heating and cooling system, new roof, and deck. Under the Federal Highway Regulations, DOT made an offer to purchase the property. However, the Colemans did not accept this offer apparently because it was based on the DOT's initial appraisal of the property in August 1993 which did not include the renovations.

On 28 June 1994, DOT filed a condemnation action as to the 0.22 acres and deposited \$31,900.00 with the Cabarrus County Clerk of Superior Court for the taking of the property and for any damages to the remaining house and property. The Colemans answered denying the sufficiency of this amount and requested a jury trial.

Before trial, the Colemans made a motion in limine to exclude "evidence of access or lack of access to adjacent property, for maintenance of a septic tank . . . to service the subject property[,] . . . the identity of adjoining property owners, . . . [and] evidence of the [Colemans'] motives in improving the [Coleman tract] before the date of the taking" on the grounds that the evidence is irrelevant and thus inadmissible. The trial court denied the motion in limine. At trial, the Colemans renewed their objections to the introduction of this evidence by objecting to the admission of evidence regarding whether a replacement septic tank could be placed on the adjacent property to service the Coleman tract and evidence of the Colemans' motives in improving the Coleman tract before the date of the taking. The trial court overruled the objections.

Consistent with this evidence, the trial court instructed the jury that the Colemans had a duty "to minimize the damages by taking all reasonable precautions which would avert or diminish the injuries to the remaining area [and] to exercise such care in preventing injury to the property as may be reasonably expected of a person of ordinary prudence under like circumstances." The trial court further instructed the jury that if it found that the Colemans had breached this duty "and injury to their property . . . occurring, then the Department would not be responsible for that loss." The trial judge then instructed the jury that "[i]n this case there was some evidence . . . that the landowners owned some other property adjacent to that which is the subject of this action . . . available to them for the [place-

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ment of] a septic tank . . . which they chose to convey to others” which they could consider in the “determination of whether or not any damages were caused by the property owners themselves.”

The Colemans contend that evidence of a property owner’s transactions and activities, prior to the date of a Chapter 136 condemnation, related to the condemned property is irrelevant and therefore inadmissible in a trial to determine the amount of just compensation. We disagree.

Evidence that the Colemans engaged in some conduct for the sole purpose of increasing their damages in this condemnation proceeding is relevant and admissible under N.C. Gen. Stat. § 8C-1, Rule 404(b) (1996) to prove the “motive” or intent of the owners in making the improvements to their property. Evidence that the renovations by the Colemans were made in bad faith and for the purpose of enhancing their damages is relevant and competent evidence for a jury to consider in the determination of the value of property at the time of the taking. *See generally State ex rel. Herman v. Schaffer*, 515 P.2d 593 (Ariz. 1973) (noting that landowner may not recover value of improvements placed on land after knowledge of impending condemnation where improvements are made in bad faith). The jury in this case, heard all the evidence, evaluated the respective contentions of the parties, and apparently concluded that the Colemans made improvements on the subject property to increase their damages.

Furthermore, we believe that the duty of the Colemans to mitigate their damages included the avoidance of conduct which would increase their damages. *See* 26 Am. Jur. 2d *Eminent Domain* § 140 (1996). To hold otherwise simply encourages parties in the position of the Colemans to engage in conduct which will increase their damages rather than mitigate them. Therefore, we conclude that Judge Davis correctly instructed the jury regarding the property owners’ obligation to “minimize the damages.”

Accordingly, with this jury’s verdict, we find,

No error.

Judge TIMMONS-GOODSON concurs.

Judge GREENE dissents.

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Judge GREENE dissenting.

I do not agree that evidence of a property owner's transactions and activities, prior to the date of a Chapter 136 condemnation, is admissible to determine the amount of just compensation. I would award the plaintiffs a new trial.

The damages in a Chapter 136 condemnation proceeding are to be determined as of the date of the taking. N.C.G.S. § 136-112 (1993). The taking occurs on the date Department of Transportation (DOT) files a civil action and declaration of taking. N.C.G.S. § 136-103 (1997).

Where only a part of a tract [of land] is taken, the measure of damages . . . shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

N.C.G.S. § 136-112(1). If the entire tract of land is taken, the measure of damages "shall be the fair market value of the property at the time of taking." N.C.G.S. § 136-112(2). The fair market value of the property is to be determined "on the basis of conditions existing at the time of the taking," *City of Charlotte v. Recreation Comm'n*, 278 N.C. 26, 33, 178 S.E.2d 601, 606 (1971), and evidence of actions taken by either DOT or the property owners in anticipation of the condemnation is not admissible. *North Carolina State Highway Comm'n v. Hettiger*, 271 N.C. 152, 156, 155 S.E.2d 469, 472-73 (1967); *Templeton v. State Highway Comm'n*, 254 N.C. 337, 339, 118 S.E.2d 918, 920-21 (1961) (only evidence relevant to the fair market value on the date of the taking is admissible); James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 19-1, at 805 (Patrick K. Hetrick & James B. McLaughlin, Jr., eds., 4th ed. 1994) (property owner free to exercise normal rights incidental to ownership prior to actual declaration of taking).

In this case the evidence relating to the Colemans' purchase and subsequent transfer of an adjoining tract of land and the motives of the Colemans in making renovations to the house were inadmissible. Although it may tend to show (as DOT argues) that the Colemans engaged in some conduct for the sole purpose of increasing their damages in this condemnation proceeding, the evidence is not rele-

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vant to the determination of the fair market value of the property on the date of the taking.¹ It follows that the trial court also erred in instructing the jury to consider this evidence in assessing the damages. For the same reasons the instructions regarding the property owners' obligation to "minimize the damages" was error.

THELMA LLOYD, PETITIONER V. TOWN OF CHAPEL HILL AND THE TOWN OF CHAPEL HILL BOARD OF ADJUSTMENT, RESPONDENT, AND MARK AND VALERIE S. BROADWELL, KEVIN FOY, GLENN PARKS, AND MARIO PIERONI, INTERVENORS

No. COA95-1440

(Filed 2 September 1997)

Zoning § 113 (NCI4th)—variance from development ordinance—standing of intervenors—damages distinct from rest of the community

The trial court erred by finding that intervenors had standing in an action challenging the Chapel Hill Board of Adjustment's denial of petitioner's request for a variance from the Resource Conservation District provisions of the town's development ordinance where the intervenors were owners of near-by property but there was no evidence of a diminishment of the intervenors' property values and there was no showing that the intervenors would suffer any special damages "distinct" from the rest of the community. N.C.G.S. § 160A-388(e).

Appeal by intervenors and cross-appeal by petitioner from order entered 11 October 1995 by Judge David Q. LaBarre in Orange County Superior Court. Heard in the Court of Appeals 24 September 1996.

Michael B. Brough & Associates, by Michael B. Brough, for petitioner cross-appellant.

Grainger R. Barrett for intervenors-appellants.

1. I do not address, as it is not presented in this appeal, whether evidence of a property owner's transactions after receiving written notice of a public condemnor's "intent to institute an action to condemn property," filed pursuant to N.C. Gen. Stat. § 40A-40 (1984), and before the filing of the complaint and declaration of taking, as is required under section 40A-41, would be admissible. I do note that the condemnation procedure for DOT (N.C.G.S. § 136-103) does not require any written notice of condemnation prior to the filing of the declaration of taking. See James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 19-3, at 818 (referring to a Chapter 136 condemnation as a "quick take" condemnation).

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*Kevin Foy, pro se, for intervenors-appellants.**Ralph D. Karpinos, for Town of Chapel Hill and the Town of Chapel Hill Board of Adjustment.*

JOHN, Judge.

Intervenors appeal the trial court's order directing respondent the Town of Chapel Hill Board of Adjustment (the Board) "to approve, grant and issue" petitioner Thelma Lloyd's (Lloyd) request for ten variances from the Resource Conservation District (RCD) provisions of respondent the Town of Chapel Hill's (the Town) Development Ordinance (the Ordinance). Lloyd challenges intervenors' standing to intervene by cross-appeal. We hold intervenors were not aggrieved parties entitled to intervene in the proceedings at issue and consequently vacate that portion of the trial court's order concluding "[i]ntervenors have standing to appear in this matter" and dismiss the latter's purported appeal.

The relevant facts are not in dispute. Lloyd and her late husband subdivided and recorded the ten tracts in question in 1949. The parcels lie completely within the 100 year flood plain for Bolin Creek within the Town. Seeking to limit development in areas along water-courses within its boundaries, the Town in 1985 adopted the RCD provisions as Article 5 of the Ordinance. As a result, development or land-disturbing activity within the RCD is prohibited without a variance. Section 5.7 of the Ordinance permits the Board to grant a restricted variance to property owners who demonstrate that application of the RCD regulations would leave no legally reasonable use of their property.

Lloyd applied to the Board 26 April 1995 for variances to allow construction of single family homes on the ten lots. The Town Planning Department staff indicated Lloyd's applications complied with appropriate requirements of the RCD Ordinance and forwarded the requests to Town staff.

A public hearing on Lloyd's requests was conducted 7 June 1995 by the Board. Lloyd spoke in favor of allowing the variances, relying solely on the financial hardship caused by enforcement of the RCD restrictions as the basis for her petitions. Roger S. Waldon, Planning Director for the Town, submitted a memorandum indicating planning staff did not believe the proposed variances would increase flooding problems, pose additional threats to public safety, cause significant

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removal of wildlife habitat, interfere with the Town's Greenway plan, create any public nuisance, or conflict with any law or ordinance. Those opposed to the variances, including intervenors, questioned whether Lloyd had met the requirements for obtaining a variance, spoke of existing problems with flooding in the Bolin Creek area, and expressed concern about the effect grant of the variances would have on flooding, traffic and safety in the community as well as upon open spaces and noise and pollution buffers. Intervenors also presented a petition containing 182 signatures purporting to oppose grant of the variances.

Immediately following the hearing, the Board voted six to four to allow the variances. However, because the relevant statute required a four-fifths affirmative vote to amend a zoning ordinance to grant a variance, Lloyd's applications were denied. *See* N.C.G.S. §160A-388(e) (1994).

On 7 July 1995, Lloyd filed a petition (the Petition) for writ of certiorari pursuant to G.S. § 160A-388(e) in Orange County Superior Court, seeking review of the action of the Board. The writ issued the same day. The Petition asserted, *inter alia*, that the Board's action was arbitrary and capricious and was not supported by competent or material evidence in the record.

The Town filed no answer to the Petition; however, intervenors filed a motion to intervene 4 August 1995. Intervenors alleged, *inter alia*, that their interests would

not be adequately protected by Respondents Town of Chapel Hill and the Town of Chapel Hill Board of Adjustment, since the Chapel Hill Town Council has determined that the Town will not take an active role in this proceeding to defend the Board of Adjustment's decision.

The motion was accompanied by a single affidavit setting out the distance each intervenor lived from the ten tracts owned by Lloyd. The trial court allowed the motion to intervene 1 September 1995.

Following a hearing on the Petition conducted 25 September 1995, the trial court entered an order dated 11 October 1995 setting out conclusions of law to the effect, *inter alia*, that the parties seeking to intervene had standing in the matter, that Lloyd had complied with the Ordinance and met the requirements for exemption from the RCD restrictions, and that the Board failed to find, nor did evidence in the record indicate, that granting the variance would violate any

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conditions set out in the Ordinance. The court further concluded the Board had a mandatory duty to grant a variance when conditions contained in the RCD Ordinance were met, and remanded the case to the Board with direction to issue Lloyd a variance from the RCD provisions for each of the ten lots.

Although the Town took no action to appeal the trial court's order, intervenors filed notice of appeal 31 October 1995. Lloyd filed notice of cross-appeal 8 November 1995.

We first note that while the Town failed to appeal, it has filed a brief in response to Lloyd's cross-appeal. The sole issue addressed by Lloyd is the standing of intervenors. In our discretion, we waive the motion requirement of N.C.R. App. P. 28(I) and consider the Town's brief an *amicus curiae* brief in support of intervenors. See N.C.R. App. P. 28(I), N.C.R. App. P. 2, and *In re Estate of Tucci*, 104 N.C. App. 142, 148, 408 S.E.2d 859, 863 (1991), *disc. review dismissed as improvidently granted*, 331 N.C. 749, 417 S.E.2d 236 (1992).

Lloyd's single argument on appeal is that "intervenors neither alleged nor demonstrated sufficient special damages from the variances at issue in this case to give them standing to intervene in this matter," and that their appeal consequently should be dismissed. We agree.

The instant action came to the trial court as an appeal by Lloyd from the Board's decision by means of writ of certiorari pursuant to G.S. § 160A-388(e). Only persons "aggrieved" within the meaning of the section possess standing to seek judicial review thereunder. An aggrieved party is one who either shows a legal interest in the property affected or, in the case of a "nearby property owner, [shows] some special damage, distinct from the rest of the community, amounting to a reduction in value of [that owner's] property." *Allen v. City of Burlington Bd. of Adjustment*, 100 N.C. App. 615, 618, 397 S.E.2d 657, 659 (1990) (citation omitted).

Significantly for purposes of the case *sub judice*, the allegations of a party seeking to participate in an action brought pursuant to G.S. § 160A-388(e) must reflect that said party is thus "aggrieved." See *Heery v. Zoning Board of Adjustment*, 61 N.C. App. 612, 613-14, 300 S.E.2d 869, 870 (1983) (petitioners alleged only "that they were property owners who would suffer a decline in the value of their land," but failed to allege they would be subject to "'special damages' distinct from the rest of the community"); see also *Concerned Citizens v. Bd.*

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of *Adjustment of Asheville*, 94 N.C. App. 364, 366, 380 S.E.2d 130, 131 (1989) (citation omitted) (plaintiffs failed to allege they “would be subject to ‘special damages’ distinct from the rest of the community,” alleging “nothing more than that they [were] nearby or adjacent property owners,” which was “insufficient to allege standing under N.C.G.S. § 160A-388(e)”).

Intervenors’ motion simply stated they “own[ed] property in the immediate vicinity” of that upon which variances had been sought and that grant of the variances “would materially adversely affect the value of [intervenors’] property.” However, the motion contained no allegation of “special damages distinct from the rest of the community.” See *Concerned Citizens v. Bd. of Adjustment of Asheville*, 94 N.C. App. at 366, 380 S.E.2d at 131, and *Heery v. Zoning Board of Adjustment*, 61 N.C. App. at 614, 300 S.E.2d at 870; see also *Davis v. City of Archdale*, 81 N.C. App. 505, 508, 344 S.E.2d 369, 371 (1986) (allegation of diminution in value of property due to increased traffic on roads and increased demands on public utilities are not “special damages distinct from those of the rest of the community”). Moreover, intervenors’ supporting affidavit simply delineated the location, some 0.35 to 0.65 miles from Lloyd’s property, of the residence of each named intervenor, but specified no special damages each would allegedly suffer in the event the variances were granted. Because intervenors failed to allege they “would be subject to ‘special damages’ distinct from the rest of the community,” *id.*, the trial court erred in allowing intervenors’ motion.

Assuming *arguendo* intervenors properly alleged they would be “aggrieved” by grant of the variances, moreover, the record reveals no evidence which would sustain a finding by the trial court of special damages to which intervenors might be subjected, nor did the trial court’s order contain such a finding, merely providing that it appeared the “motion should be allowed.” See *Heery v. Zoning Board of Adjustment*, 61 N.C. App. at 614, 300 S.E.2d at 870 (“importantly, the petitioners failed to allege, and the Superior Court failed to find, that petitioners would be subject to ‘special damages’ distinct from the rest of the community”).

In addition to intervenors’ supporting affidavit, the record before the trial court included statements to the Board by each individual intervenor. Kevin Foy addressed the procedural requirements of the RCD ordinance and questioned whether Lloyd had demonstrated the requisite financial hardship to qualify for variances. Glenn Parks expressed concern about the effect of granting a variance on the

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community's open space and indicated his property was presently subject to existing sewage problems associated with flooding. However, Parks proffered no explanation as to how grant of the variances might affect pre-existing flooding problems. Mark Broadwell also related previous flooding problems, but again presented no exposition of any relationship between this problem and grant of the variances. Mario Pieroni expressed concern that granting the variances would "set[] a dangerous precedent." Valerie Broadwell (Broadwell) addressed the effect of the proposed variances on urban wildlife, pollution buffers, and noise buffers—damages common to the community in general as opposed to being distinctly those of Broadwell. Moreover, Broadwell conceded she had no knowledge of the effect of the proposed construction on the noise buffer and presented no specific information as to the effect of granting the variances on pollution buffers.

In short, nothing in the statements of intervenors to the Board evidenced a diminishment of property values or revealed an assertion of special damages "distinct from the rest of the community." We likewise have reviewed the remainder of the record and find no evidence which would sustain a finding intervenors would be subject to special damages if the variances were granted.

Based on the foregoing, that portion of the trial court's 11 October 1995 order determining "[i]ntervenors have standing to appear in this matter" is vacated, *see Concerned Citizens v. Bd. of Adjustment of Asheville*, 94 N.C. App. at 367, 380 S.E.2d at 132, and intervenors purported appeal is dismissed, N.C.R. App. P. 3; *see Culton v. Culton*, 327 N.C. 624, 625-26, 398 S.E.2d 323, 324-25 (1990) (only aggrieved party may appeal from order or judgment).

Order allowing intervention vacated; appeal by intervenors dismissed.

Judges WYNN and McGEE concur.

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[127 N.C. App. 353 (1997)]

MITCHELL COUNTY DEPARTMENT OF SOCIAL SERVICES, APPELLEE/PETITIONER V.
MICHELLE CARPENTER, APPELLANT/RESPONDENT

No. COA97-261

(Filed 2 September 1997)

1. Appeal and Error § 206 (NCI4th)— notice of appeal—time not tolled by Rule 60 motion—notice of appeal not timely—dismissal of appeal

Respondent's time for filing a notice of appeal from an 11 June 1996 order terminating her parental rights was not tolled by respondent's filing of a Rule 60 motion seeking relief from the trial court's order on the basis of excusable neglect; therefore, since respondent failed to give timely notice for appeal from the 11 June 1996 order, the appeal was dismissed.

2. Judgments § 419 (NCI4th)— termination of parental rights—failure to appear—not excusable neglect

The trial court did not err in refusing to set aside a judgment against respondent on the ground of excusable neglect for her failure to appear at a hearing to terminate her parental rights where the evidence in the record revealed that respondent was disabled, did not have a driver's license, depended upon her husband and others for transportation, and did not have a telephone; she did not ask her husband to take her to court until the day of the hearing and he refused; she did not ask her in-laws, who lived nearby, if she could use their phone to call her attorney when she discovered no transportation was available; and nothing in the record shows that respondent was lulled into missing the court date by any assurances of her husband.

Judge WYNN dissenting.

Appeal by respondent from orders entered 11 June 1996 and 28 November 1996 by Judge R. Alexander Lyerly in Mitchell County District Court. Heard in the Court of Appeals 25 August 1997.

On or about 9 February 1996, petitioner Mitchell County Department of Social Services filed a petition to terminate the parental rights of respondent and her husband with regard to their minor child, Brittany Michelle Carpenter. An order had previously been entered adjudging the child to be a neglected juvenile and placing her in petitioner's custody.

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Respondent failed to appear at a hearing held 4 June 1996, but she was represented by counsel at the hearing. Respondent's counsel moved for a continuance, but the trial court denied the motion. Petitioner presented evidence, and the trial court heard arguments of counsel. On 11 June 1996, the trial court entered an order finding, *inter alia*, as follows:

6) In an Order entered on 12 April 1994, by the Honorable Claude Smith, District Court Judge, the juvenile herein was adjudicated as a neglected juvenile pursuant to N.C.G.S. § 7A-517(21).

7) The above captioned juvenile has been in the custody of the Petitioner, Mitchell County Department of Social Services, since 12 April 1994.

8) Petitioner has provided numerous services to respondents, in order to achieve reunification. These efforts have been unsuccessful, and respondent parents have failed to consistently comply with requirements of the reunification plan.

9) The juvenile herein has remained in the custody of Petitioner for a period in excess of twelve months without any substantial progress by respondent parents to eliminate the conditions resulting in the removal of the child from their care and the aforementioned neglect adjudication.

Based upon its findings, the trial court concluded as follows:

1) The aforementioned respondent parents have willfully left the child in foster care for more than twelve months consecutive, without showing to the satisfaction of the Court that substantial progress has been made within twelve months in correcting those conditions which led to the removal of the child, and without showing positive response within twelve months to the diligent efforts of the Petitioner to encourage the parents to strengthen the parental relationship to the minor child or to make and follow through with constructive planning for the future of the minor child.

2) The minor child herein has been adjudicated as a neglected child as defined by N.C.G.S. § 7A-517(21).

Based upon its conclusions, the trial court ordered that respondent's parental rights as to Brittany Carpenter be terminated.

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On 25 September 1996, respondent filed a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 (1990) seeking relief from the trial court's orders denying her motion for a continuance and terminating her parental rights. In the motion, respondent stated she was unable to attend the hearing on 4 June 1996 because she is physically disabled, does not have a driver's license, and when she asked her husband to take her to court on the morning of the hearing he refused because he felt they would lose the case. Respondent further asserted that had she been in court she "would have shown that the plans for reunification established by [petitioner] were inadequate in light of [her] disabilities . . . and her personal living situation."

Following a hearing held on 12 November 1996, the trial court entered an order making the following pertinent findings of fact:

6) The files and records in these matters are replete with efforts, on behalf of Mitchell County DSS, to reunify Brittany Michelle Carpenter with Respondent Michelle Carpenter. These files and records are replete with examples of Respondent Michelle Carpenter's failure to show any substantial progress in obtaining this reunification.

7) Respondent Michelle Carpenter received adequate and legal notification of the termination hearing scheduled for 04 June 1996. It was incumbent upon her to appear at that time if she desired to be heard in that matter.

Based upon these findings of fact, the trial court concluded as follows:

1) There is no excusable neglect, on the part of Respondent Michelle Carpenter, relative to her failure to appear at the hearing on 04 June 1996.

2) Respondent Michelle Carpenter has no meritorious defense to the proceeding terminating her parental rights to Brittany Michelle Carpenter.

Based upon these conclusions, the trial court denied respondent's Rule 60 motion. Respondent gave notice of appeal from the trial court's 11 June 1996 order terminating her parental rights and 28 November 1996 order denying her Rule 60 motion.

Harrison & Poore, PA, by Hal G. Harrison, for petitioner appellee.

Brian A. Buchanan for respondent appellant.

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SMITH, Judge.

[1] We note at the outset that respondent has not assigned error to the 11 June 1996 order terminating her parental rights. Furthermore, respondent's notice of appeal with regard to that order was not timely because a motion made pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 does not toll the time for filing notice of appeal from the underlying judgment. *See* N.C.R. App. P. 3(c); *Parrish v. Cole*, 38 N.C. App. 691, 248 S.E.2d 878 (1978). Insofar as respondent gave notice of appeal from the 11 June 1996 order, the appeal must be dismissed.

[2] Respondent's only argument presented on appeal is that the trial court abused its discretion by denying her motion for a new trial. She contends the trial court should have granted the requested relief because she showed excusable neglect for her failure to appear at the termination hearing and because her pleadings established a meritorious defense to the petition. We disagree.

"To set aside a judgment on the grounds of excusable neglect under Rule 60(b), the moving party must show that the judgment rendered against him was due to his excusable neglect and that he has a meritorious defense." *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 424, 349 S.E.2d 552, 554 (1986). A motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion, *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975). What constitutes excusable neglect is a question of law which is fully reviewable on appeal. *In re Hall*, 89 N.C. App. 685, 366 S.E.2d 882, *disc. review denied*, 322 N.C. 835, 371 S.E.2d 277 (1988) "However, the trial court's decision is final if there is competent evidence to support its findings and those findings support its conclusion." *Id.* at 687, 366 S.E.2d at 884. "[W]hat constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case." *McInnis*, 318 N.C. at 425, 349 S.E.2d at 555.

The record in this case shows that respondent is disabled, that she does not have a driver's license, depends upon her husband and others for transportation, and does not have a telephone. However, the record also shows she did not ask her husband to take her to court until the morning of the hearing and her in-laws, who have a telephone, lived nearby.

We believe the evidence in the record supports the trial court's conclusion that respondent's failure to appear did not amount to

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excusable neglect. A party paying proper attention to her case would have made transportation arrangements prior to the day the case was scheduled for hearing or would have contacted her attorney when she discovered no transportation was available. Furthermore, nothing in the record shows respondent was lulled into missing the court date by any assurances of her husband. *Cf. McInnis*, 318 N.C. 421, 349 S.E.2d 552 (holding that the defendant's failure to respond to a complaint was due to excusable neglect where she reasonably relied upon her husband's assurances the matter had been taken care of). The trial court did not err by concluding that respondent's actions did not amount to excusable neglect.

Absent a showing of excusable neglect, any meritorious defense pled by the movant becomes immaterial. *Hall*, 89 N.C. App. 685, 366 S.E.2d 882. Therefore, we need not address respondent's remaining argument that the pleadings revealed she had a meritorious defense.

The order of the trial court denying respondent's Rule 60(b) motion is affirmed. Respondent's purported appeal from the order terminating her parental rights is dismissed.

Affirmed in part; appeal dismissed in part.

Judge WYNN dissents.

Judge JOHN concurs.

Judge WYNN dissenting:

I believe that the trial court abused its discretion in not granting the Rule 60 relief sought by Ms. Carpenter.

First, the record indicates that grounds for excusable neglect existed in this case. It is undisputed that Ms. Carpenter suffers from a genetic disease known as Myotonic Dystrophy (a disease similar to Muscular Dystrophy) which leaves her physically disabled. She therefore has been unemployable and is unable to drive. Moreover, she lives in a basement apartment without a telephone. Also, her child, Brittany, the subject of this termination proceeding, suffers from the same disease having apparently inherited the trait from her mother. Brittany receives SSI benefits which are paid directly to DSS.

On at least two occasions prior to the termination hearing on 4 June 1996, Ms. Carpenter appeared in district court for hearings

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scheduled on the petition to terminate her parental rights. On each occasion, the matters were continued at the behest of the trial judges who recused themselves because of personal conflicts with the case. Apparently, on each of these two occasions, she relied on her husband to get her to the hearings and was able to attend without incidence.

Like the first two hearings, Ms. Carpenter relied on her husband to transport her on 4 June 1996 to the third scheduled hearing on the petition to terminate her parental rights. Undisputedly, she asked him to take her to district court on that date as she had on the two prior occasions. He refused. With no means of transportation, no telephone and no evidence that her in-laws who lived near her were available or willing to take her to court, she, although desiring to be present at the hearing to terminate her relationship with her daughter, could not attend. This, I believe, is sufficient evidence to show that this disabled mother showed that her absence was due to excusable neglect.

Second, Ms. Carpenter showed that she had a meritorious defense to the petition. In her affidavit, she points out that the plans for reunification by DSS were inadequate to promote reunification with her daughter. The record shows that the plan called for her husband to transport her to visit with the child at a child care center during his lunch break. While some visits were made, the trial court found that the efforts were inadequate. Apparently, like the 4 June 1996 hearing, the husband did not provide transportation to all or most of the visits. It is significant to note that DSS, although fully aware of her debilitating condition and transportation difficulties, made no effort to arrange in-home visits with the child.

In sum, I conclude that Ms. Carpenter showed that her absence at the 4 June 1996 hearing was due to excusable neglect and that there was evidence that she had a meritorious defense to the petition. I believe the trial court should have granted the continuance at the third hearing to allow Ms. Carpenter an additional opportunity to be present. I, therefore, dissent.

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PEDRO C. SMITH, PLAINTIFF-EMPLOYEE v. SEALED AIR CORPORATION, DEFENDANT-EMPLOYER, AND HARTFORD INSURANCE COMPANY, DEFENDANT-CARRIER

No. COA96-801

(Filed 2 September 1997)

**Workers' Compensation § 236 (NCI4th)— injured employee—
“make-work” job not available in labor market—not evi-
dence of capacity to earn wages**

The Industrial Commission properly concluded that the scrap baling job offered to plaintiff, an injured employee, by defendant employer was a “make-work” job not ordinarily available in the competitive job market and could not be considered as evidence of plaintiff’s capacity to earn wages where the evidence in the record indicated that the baler position was not advertised to the general public and was not included in defendant’s regular budget; execution of the baler job would require an average person to expend only two hours per day; and there were minimal expectations for plaintiff’s performance of the baler job. Therefore, plaintiff’s rejection of the baler job did not require termination of his temporary total disability benefits.

Appeal by defendants from Opinion and Award entered 16 February 1996 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 April 1997.

Tamela G. Clayton for plaintiff-appellee.

Morris York Williams Surles & Brearley, L.L.P., by John F. Morris and Lyndon R. Helton, for defendant-appellants.

JOHN, Judge.

Defendants appeal an Opinion and Award of the North Carolina Industrial Commission (the Commission) granting plaintiff continued benefits for total disability. Defendants contend the Commission erred by “concluding that the job offered to plaintiff-employee by defendants [could] not be considered as evidence of his ability to earn wages.” We affirm the Commission.

Pertinent facts and procedural information include the following: plaintiff was injured in the course of his employment with defendant Sealed Air Corporation (Sealed) on 2 May 1990 when he fell from a loading dock and a steel ramp struck his right foot. Plaintiff suffered

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three undisplaced fractures of his right leg which appeared to heal normally. However, plaintiff subsequently developed reflex sympathetic dystrophy syndrome (RSD), a condition that caused him great pain in his right foot.

Defendants initially admitted compensability of plaintiff's injury, executed a Form 21 "Agreement for Compensation for Disability" which was approved by the Commission 22 March 1991, and paid plaintiff temporary total disability. However, Sealed subsequently offered plaintiff a position as baler, whose duties included loading scrap paper material into a hamper and thereafter pushing a button to activate equipment within the machine which compressed the scrap into a tight bale. The process of loading and compressing continued until a full-sized bale was produced. A forklift thereafter unloaded the hamper. Plaintiff attempted to perform this job for approximately four hours in 1991, but stopped, complaining of increased pain.

Compensation to plaintiff was terminated 12 August 1992 by order of a Deputy Commissioner for failure to comply with recommended treatment. *See* N.C.G.S. § 97-25 (1991). Following plaintiff's compliance with medical treatment specified in that order, a Form 26 Agreement between plaintiff and defendants reinstating temporary total disability compensation was approved by the Commission 11 December 1992.

On 2 August 1993, Sealed again formally offered plaintiff the baler position. Plaintiff declined. Defendants' two Form 24 applications to terminate compensation were denied in September 1993, and they subsequently filed a request for hearing in December 1993.

The matter came on to be heard 19 May 1994. The Deputy Commissioner determined the baler position to be within plaintiff's capabilities and terminated his temporary total disability benefits as of the date of hearing. Upon review, the Commission reversed, stating

[t]he baler job is not one which is available in the open and competitive labor market and is not reflective of plaintiff's actual wage earning capacity.

The Commission further ruled plaintiff continued to be totally disabled and awarded him benefits accordingly. Defendants filed notice of appeal to this Court.

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In reviewing a decision of the Commission, our inquiry is limited to two questions: (1) whether the Commission's findings are supported by any competent evidence in the record, and (2) whether those findings support the Commission's conclusions of law. *Moore v. Davis Auto Service*, 118 N.C. App. 624, 627, 456 S.E.2d 847, 850 (1995).

Generally, the burden lies with an injured employee to establish the existence and extent of disability, *i.e.*, the incapacity to earn wages. *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 205, 472 S.E.2d 382, 386, *cert. denied*, 344 N.C. 629, 477 S.E.2d 39 (1996). However, where there has been a previous determination of total disability, such as in the case *sub judice* where both a Form 21 and a Form 26 agreement were approved by the Commission, the employee is entitled to a presumption of continuing disability. *Stone v. G & G Builders*, 121 N.C. App. 671, 674-75, 468 S.E.2d 510, 512-13 (1996), *disc. review allowed*, 343 N.C. 757, 473 S.E.2d 627 (1996), *and rev'd on other grounds*, 346 N.C. 154, 484 S.E.2d 365 (1997). Thereafter, it is incumbent upon the employer to come forward with evidence that suitable jobs are available to the employee and "that the [employee] is capable of getting one," taking into account the employee's "age, education, physical limitations, vocational skills, and experience." *Franklin*, 123 N.C. App. at 206, 472 S.E.2d at 386 (quoting *Burwell v. Winn-Dixie Raleigh*, 114 N.C. App. 69, 73, 441 S.E.2d 145, 149 (1994)). Moreover, the employer may at any point also show the employee is no longer entitled to benefits because of the latter's unjustified refusal to accept a specific offer of suitable employment. *Id.*, *see* N.C.G.S. § 97-32 (1991).

In the case *sub judice*, defendants contend plaintiff failed to accept the job of baler with Sealed and his benefits should therefore have been terminated. In particular, defendants assign error to the Commission's findings of fact numbers six, seven and nine (#6, #7 and #9) as "not supported by competent evidence of record." We address each in turn.

Finding of fact #6 commences with the statement that on 2 August 1993 "defendants offered plaintiff a job as a baler which he refused to accept." A detailed description of the duties of the position follows, including the notation that approximately twenty minutes are consumed in the production of one bail of scrap materials. Finally, finding # 6 relates that "[i]n 1993, six bales were made per day" by Sealed.

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Defendants' appellate brief does not specify which of the foregoing provisions they challenge. *See* N.C.R. App. P. 28(a) (assignments of error not argued in appellant's brief are deemed abandoned). However, our review reveals competent evidence in the record supports each statement, *see Moore*, 118 N.C. App. at 627, 456 S.E.2d at 850, the main source being defendants' own witness, plant manager Gary Trexler (Trexler).

As to finding of fact #7, defendants assign error to the portion thereof which provides as follows:

The baler job is not one which is available in the open and competitive labor market and is not reflective of plaintiff's actual wage earning capacity.

This assignment of error is unfounded.

Peoples v. Cone Mills Corp., 316 N.C. 426, 439, 342 S.E.2d 798, 806 (1986), directs that creation for injured employees of makeshift positions which do not exist in the ordinary marketplace will not meet an employer's responsibilities under the Workers' Compensation Act.

Proffered employment would not accurately reflect earning capacity if other employers would not hire the employee with the employee's limitations at a comparable wage level. The same is true if the proffered employment is so modified because of the employee's limitations that it is not ordinarily available in the competitive job market. The rationale behind the competitive measure of earning capacity is apparent. If an employee has no ability to earn wages competitively, the employee will be left with no income should the employee's job be terminated.

Id. at 438, 342 S.E.2d at 806. Thus, when an employer attempts to show an employee is no longer entitled to compensation for disability based upon the proffer of a job specially created for the employee, the employer must come forward with evidence that others would hire the employee "to do a similar job at a comparable wage." *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 765, 487 S.E.2d 746, 750 (1997). Defendants herein presented no such evidence in reference to the baler position tendered to plaintiff.

Moreover, the Commission's finding that the job offered to plaintiff was not one "available in the open and competitive labor market," *i.e.*, was essentially make-work, is supported by the notations in finding # 7 that

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No employees are actually assigned to [the baler] position on a full-time basis. The baler work is performed as need by six to eight different employees who are taken from other jobs in the plant and who have time to do the baling.

These statements are supported by competent evidence in the record and are not contested by defendants. In addition, evidence was provided at the hearing that the baler position was not advertised to the general public and was not included in Sealed's regular budget, two factors tending to sustain characterization of the job as specially created for plaintiff.

Further examination of the transcript also reveals substantial evidence suggesting the baler job would *not* be available in the competitive market. Defendants' witness Trexler testified the "average person" would compact one bale of refuse in twenty minutes. Moreover, Trexler indicated that Sealed produced eight to nine bales per day in 1991, but that, due to new waste reduction equipment, the amount was reduced by 1993 to six bales per day. At the time of the hearing, in 1994, the plant was down to four to five bales per day. Thus, by defendants' own testimony, execution of the job offered by Sealed to plaintiff in 1993 would require the average person to expend but two hours per day.

Finally, Trexler made it clear there were minimal expectations for plaintiff's performance of the baler position. Trexler testified that other employees would give plaintiff "whatever help he needed" in performing his job and that it would be "acceptable" if plaintiff were physically limited to producing a single bale per day.

Our Supreme Court in *Cone Mills* rejected "offering an injured employee employment which the employee under normally prevailing market conditions could find nowhere else." 316 N.C. 426, 439, 342 S.E.2d 798, 806. It defies reason and sound business practice to accept that an employer in the competitive market would employ an individual for a full forty hour week to perform a job completed by the average person in a mere ten hours, or that a company producing six bales of waste daily would hire an employee physically limited to assembling a single bale per day. Likewise, jobs in the competitive market are not customarily designed with a view towards providing an employee "whatever help [is] needed" to complete job tasks. Defendants thus offered plaintiff a position which he "under normally prevailing market conditions could find nowhere else," *id.*

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Defendants further rely on provisions of the Americans with Disability Act (ADA), 42 U.S.C. § 12101 *et seq.*, to support their exception to the initial portion of finding #7. We decline to address this contention.

N.C.R. App. P. 10(c)(1) provides that assignments of error in the record on appeal “shall state plainly, concisely and without argumentation the legal basis upon which error is assigned.” However, defendants failed to include in their assignments of error to this Court any reference to the ADA as supportive of their legal arguments. The “scope of review on appeal is confined to a consideration of those assignments of error set out in the record” in compliance with the guidelines of N.C.R. App. P. 10, *see* N.C.R. App. P. 10(a), and defendants’ arguments founded upon the ADA have not been properly presented to us.

The Commission’s finding #9, the last to which defendants object, in the main provides that “plaintiff is incapable of earning wages with defendants or in any other employment.” As noted above, defendants failed to rebut the presumption of plaintiff’s continuing total disability by showing suitable jobs were available for plaintiff and that he was capable of getting one, *see Franklin*, 123 N.C. App. at 206, 472 S.E.2d at 386, or that he refused a suitable offer of employment, G.S. § 97-32. The Commission’s finding is therefore proper. Moreover, the Commission’s findings that plaintiff is a sixty-nine year old man with a ninth grade education, a history of unskilled labor, and a limitation to performing sedentary work (unchallenged by defendants and based on evidence in the record) likewise support its determination that plaintiff is totally disabled.

Defendants’ remaining assignments of error attack those portions of the Commission’s conclusions of law providing that the baler job is “make-work” and cannot be considered as evidence of plaintiff’s capacity to earn wages, and that plaintiff remains temporarily totally disabled. Suffice it to state that the challenged conclusions indisputably are sustained by the Commission’s findings of fact discussed above. *See Moore*, 118 N.C. App. at 627, 456 S.E.2d at 850.

In sum, the Opinion and Award of the Commission is in all respects affirmed.

Affirmed.

Chief Judge ARNOLD and Judge LEWIS concur.

DEPT. OF TRANSPORTATION v. NELSON CO.

[127 N.C. App. 365 (1997)]

DEPARTMENT OF TRANSPORTATION, PLAINTIFF-APPELLEE v. THE NELSON COMPANY, A NORTH CAROLINA GENERAL PARTNERSHIP; TIM, INC., SUBSTITUTE TRUSTEE; AND NATIONSBANK (FORMERLY NCNB NATIONAL BANK OF NORTH CAROLINA), DEFENDANTS-APPELLANTS

No. COA96-777

(Filed 2 September 1997)

1. Eminent Domain § 103 (NCI4th)— condemnation—multiple parcels—treatment as unified tract—factors

North Carolina considers three factors in determining whether two or more parcels of land should be considered as one unified tract on the date of a taking: (1) unity of ownership between the parcels; (2) unity of use between the parcels; and (3) physical unity between the parcels.

2. Eminent Domain § 103 (NCI4th)— condemnation—multiple parcels—unity of ownership—partnerships

The trial court erred in a land condemnation action involving an office park by concluding that there was no unity of ownership between two parcels where the parcels were owned by two partnerships and it was undisputed that eleven of the thirteen partners that made up the two partnerships owned an interest in both parcels. *Board of Transportation v. Martin*, 296 N.C. 20, can be distinguished because one parcel there was owned by an individual and the adjacent parcel was owned by a corporation of which the individual was the sole shareholder. Here, each general partner has an ownership interest in partnership property along with the other partners.

3. Eminent Domain § 104 (NCI4th)— condemnation—multiple tracts—unity of use—uncompleted office complex

The trial court erred in a condemnation action in concluding that there was no unity of use for tracts of property which were part of a master development plan conceived as an integrated office complex with offices and a myriad of conveniences but which was only partially completed at the time the action was filed. *Board of Transportation v. Martin*, 296 N.C. 20, is distinguishable because the plan to expand the shopping center in that case arose after the shopping center was completed and fully functional, while the plan for both parcels here was conceived and approved before construction began. The undeveloped parcel here is being used in the same manner as the developed par-

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cel, as part of the continuing implementation of an original, pre-existing office park development scheme; concluding that no unity exists here would overlook the reality that commercial development is typically completed in phases.

Appeal by defendant The Nelson Company from order entered 29 March 1996 by Judge Henry V. Barnette, Jr., in Durham County Superior Court. Heard in the Court of Appeals 27 February 1997.

Michael F. Easley, Attorney General, by Archie W. Anders and Emmett B. Haywood, Assistant Attorney Generals, for the Department of Transportation.

Maupin Taylor Ellis & Adams, P.A., by John C. Cooke and William J. Brian, Jr., for defendant The Nelson Company.

WYNN, Judge.

The North Carolina Department of Transportation ("DOT") brought this land condemnation action to acquire a portion of Creekstone Office Park ("Creekstone") in Durham County, North Carolina.

Creekstone consists of: (1) a day care owned by a national day care operator; (2) an undeveloped site owned by defendant The Nelson Company ("Nelson parcel"), a North Carolina General Partnership; and (3) a lot with an office building located on it, owned by Riverbirch Associates ("Riverbirch parcel"), a North Carolina General Partnership. All eleven general partners of Nelson are general partners in Riverbirch which has two additional general partners.

In June 1994, DOT filed its taking map, a plat of the property affected for purposes of assessing damages. The taking map did not include the Riverbirch parcel (i.e., the site with the existing office building) as part of the property affected by the taking. When this matter was set for trial, Nelson refused to stipulate to the accuracy of DOT's taking map on the grounds that the Riverbirch parcel was not included as part of the affected property, and moved that the map be amended accordingly. In August 1994, the trial court denied Nelson's motion on the grounds that there was not sufficient unity of lands between the Nelson parcel and the Riverbirch parcel to treat them as one for the purposes of the condemnation. Nelson appeals from this ruling.

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[1] North Carolina considers three factors in determining whether on the date of a taking, two or more parcels of land should be considered as one unified tract: (1) unity of ownership between the parcels; (2) unity of use between the parcels; and (3) physical unity between the parcels. *Barnes v. North Carolina State Highway Comm'n*, 250 N.C. 378, 384, 109 S.E.2d 219, 224-25 (1959).

In the instant case, there is no dispute that physical unity exists between the Riverbirch and Nelson parcels. Therefore, the only issues before this Court are: (I) whether there is unity of ownership; and (II) whether there is unity of use between the two parcels. For the following reasons, we find that both unity of ownership and unity of use exist between the two parcels.

I. Unity of Ownership

[2] In *Barnes*, our Supreme Court explained the unity of ownership requirement as follows:

The parcels claimed as a single tract must be owned by the same party or parties. It is not a requisite for unity of ownership that a party have the same quantity or quality of interest or estate in all parts of the tract. But where there are tenants in common, *one or more of the tenants must own some interest and estate in the entire tract*.

Id. at 384, 109 S.E.2d at 225 (emphasis added).

In the instant case, it is undisputed that eleven of the thirteen partners that make up the two partnerships own an interest in both parcels. Nevertheless, it appears that the trial court held there was no unity of ownership based upon its interpretation of *Board of Transportation v. Martin*, 296 N.C. 20, 249 S.E.2d 390 (1978), in which our Supreme Court held that unity of ownership did not exist where one parcel was owned by an individual and an adjacent parcel was owned by a corporation of which the individual was the sole shareholder. However, in *Martin*, the property was owned by the corporation, a legal entity, totally separate from the individual shareholder. In contrast, in the instant case, each general partner has an ownership interest in partnership property along with the other partners. See N.C. Gen. Stat § 59-55(a) (1996); *Simmons v. Quick-Stop Food Mart, Inc.*, 307 N.C. 33, 296 S.E.2d 275 (1982). We, therefore, find *Martin* distinguishable and conclude that the trial court should have found that unity of ownership exists in the instant case.

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II. Unity of Use

[3] The legal standard for unity of use is whether the tracts of land “are being used as an integrated economic unit.” N.C. Gen. Stat. § 40A-67 (1996). In *City of Winston-Salem v. Yarbrough*, 117 N.C. App. 340, 346, 451 S.E.2d 358, 363, *disc. review denied*, 340 N.C. 260, 456 S.E.2d 519 (1995), this Court noted that N.C.G.S. § 40A-67 intended to codify the longstanding common law test for unity of use announced in *Barnes*:

[T]here must be such a connection or relation of adaptation, convenience, and actual and permanent use, as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used . . . The unifying use must be a *present* use. A mere intended use cannot be given effect.

250 N.C. at 385, 109 S.E.2d at 224 (citation omitted).

An office park is defined as “[a] development . . . that contains a number of separate office buildings, supporting uses, and open space designed, planned, constructed, and managed on an integrated and coordinated basis.” H. Moscovitz & C. Lindbloom, *The Illustrated Book of Development Definitions*, at 135 (Center for Urban Policy Research, 1981). The master development plan for Creekstone Office Park certainly fits this characterization: Creekstone was conceived as an integrated office complex which provides not only office space but also a myriad of conveniences—including banks, restaurants, and a day care center—for its office personnel. It is patently clear that had Creekstone Office Park been completed, it would have been considered an “integrated economic unit,” thereby meeting the unity of use requirement. Thus, the only remaining question is whether a partially-completed office park still meets the unity of use requirement. We find that it does.

In *Barnes*, our Supreme Court held that the trial court had properly joined the petitioners’ parcels, despite the fact that “[n]o actual present use was being made of the tracts at the time of the taking. The petitioners were holding the land for possible future sale for subdivision or for future sale of lots.” 250 N.C. at 386, 109 S.E.2d at 226. “Thus, the [*Barnes*] Court decided, *sub silentio*, that holding property for anticipated development is a present use.” *Yarbrough*, 117 N.C. App. at 346, 451 S.E.2d at 363. Likewise in *Yarbrough*, this Court,

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relying on *Barnes*, concluded that three tracts of land condemned by the City of Winston-Salem were being used with four other tracts as an "integrated economic unit" even though "defendants were holding [the three tracts] for future development." *Id.*

In this case, although the Nelson parcel remains basically undeveloped, the master development plan establishes a finite number of proposed uses for the tract which will be essential to the enjoyment and best use of the Riverbirch Parcel. Nevertheless, plaintiff relies heavily on *Board of Transportation v. Martin*, 296 N.C. 20, 249 S.E.2d 390, in which the Supreme Court held that there was no unity of use where one of the parcels sought to be joined was developed and occupied by a shopping center, while the other adjacent lot was undeveloped, although the owner planned to develop it as part of the shopping center. However, *Martin* is distinguishable because the plan to expand the shopping center in *Martin* arose after the shopping center was completed and fully functional. Here, however, the plan for the use of both the Nelson and Riverbirch parcels was conceived and approved before any actual construction began. Thus, the undeveloped Nelson parcel is presently being used in the same manner as the developed Riverbirch tract—it is part of the continuing implementation of an original, pre-existing office park development scheme. See *Barnes*, 250 N.C. at 385, 109 S.E.2d at 225-26 (holding that "[i]f a map of a proposed subdivision is made and the lots shown thereon are actually a compact body of land, used and occupied as an entirety, they are to be treated as one tract").

Concluding that no unity of use exists here would overlook the inherent reality of commercial development, namely that it is typically completed in phases. By not recognizing this reality, we would be asking future developers, in order to meet the unity of use requirement, to begin construction on all phases before completing any one phase. Because this is impractical both from the standpoint of the developer and from the standpoint of the commercial creditor who finances the construction, this practice should not be encouraged by the courts.

In sum, the trial court's finding that there is no unity of ownership nor unity of use between the Riverbirch and Nelson parcels is reversed and this matter is remanded in order to allow the trial court to amend the taking map.

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Reversed and remanded.

Judges LEWIS and MARTIN, Mark D., concur.

IN THE MATTER OF RE: AUSTIN EVERETTE HUNT

No. COA96-1364

(Filed 2 September 1997)

**1. Parent and Child § 97 (NCI4th)— termination of rights—
informing respondent of rights—no duty in petitioner**

In an action to terminate respondent putative father's parental rights, petitioner was not estopped from alleging that respondent failed to satisfy the elements of N.C.G.S. § 7A-289.32(6)(a)-(d) even though respondent argued that petitioner had a duty to inform respondent of his rights. There is no authority to support that position and there was sufficient evidence from which the court could conclude that respondent was aware of his legal and moral duty to support his child.

**2. Parent and Child § 108 (NCI4th)— termination of parental
rights—putative father—failure to legitimate child**

The trial court's findings that respondent in a parental rights termination had not legitimated his child were supported by the evidence where the record clearly established that respondent failed to establish paternity through judicial process, affidavit, or marriage, and his own testimony establishes that any care he provided was not consistent. The only possible manner in which he could legitimate his child under N.C.G.S. § 7A-289.32(6)(a)-(d) was to show that his support was substantial, but he provided less than \$1,000 over a three year period. This was not substantial support sufficient to avoid termination of parental rights.

**3. Parent and Child § 125 (NCI4th)— termination of parental
rights—putative father—findings—non-support—finding
of means and ability to pay—not required**

The trial court did not err in a termination of parental rights proceeding by finding that defendant did not provide substantial support without also finding that he had the means and ability to do so. N.C.G.S. § 7A-289.32(6)(d) does not require a finding that

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the putative father had the means and ability to pay child support; however, the court here found that respondent had the means and ability.

Judge WYNN dissenting.

Appeal by respondent from judgment filed 21 December 1995 by Judge Herbert L. Richardson in Robeson County District Court. Heard in the Court of Appeals 18 August 1997.

The natural mother of the minor child filed a petition on 7 September 1995 seeking to terminate respondent Charles Brown's parental rights. Following a hearing held on 13 December 1995, the trial court entered judgment making the following pertinent findings of fact:

3. The Respondent, Charles Brown, who is a citizen and resident of Robeson County, North Carolina . . . is the biological father of the child.

. . . .

5. Prior to the filing of this Petition:

a. Respondent has not established paternity judicially or by Affidavit which is to be filed in a central registry maintained by the Department of Human Resources.

b. Has not legitimated the child pursuant to North Carolina General Statutes § 49-10 or filed a Petition for that particular purpose.

c. Has not legitimated the child by marriage to the mother of the child, the Petitioner herein.

d. Has failed to provide substantial financial support or consistent care with respect to the child although he has had and has the means and abilities in which to do so.

Based upon these findings of fact, the trial court made the following conclusions of law:

a. The [c]ourt would have jurisdiction to make a child custody determination and these proceedings will not have the effect of circumventing the provisions of Chapter 50A of the North Carolina General Statutes.

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b. Grounds exist for terminating the parental rights of Respondent with respect to the child, Austin Everette Hunt, namely the grounds set out in North Carolina General Statutes 7A-289.32(6)(a)(b)(c)(d).

c. The best interest of the child requires that the parental rights of the Respondent be terminated.

Based upon these conclusions of law, the trial court ordered the termination of respondent's parental rights. Respondent appeals.

No brief for petitioner appellee.

Chad W. Hammonds for respondent appellant.

Robert D. Jacobson, Guardian ad Litem, for the juvenile.

SMITH, Judge.

Respondent offers three arguments in support of his contention that the trial court erred by terminating his parental rights. For the following reasons, we believe there is no merit to any of respondent's assignments of error.

We note preliminarily that respondent failed to comply with several provisions of the North Carolina Rules of Appellate Procedure in preparing his record on appeal, most notably Rule 28(b)(5). Failure to comply with Rule 28 subjects the appeal to dismissal. *Northwood Homeowners Assn. v. Town of Chapel Hill*, 112 N.C. App. 630, 436 S.E.2d 282 (1993). Because of the serious consequences of a proceeding to terminate parental rights, we nonetheless consider the merits of respondent's arguments. *See In re Pierce*, 67 N.C. App. 257, 312 S.E.2d 900 (1984).

[1] First, respondent argues that petitioner should have been estopped from alleging that respondent failed to satisfy the elements of N.C. Gen. Stat. § 7A-289.32(6)(a)-(d) (1995). He contends petitioner had knowledge of the grounds upon which she could petition the court to terminate respondent's parental rights, and she concealed that knowledge from him. Respondent cites no authority and we find none to support the proposition that petitioner had a duty to inform him of his rights under the law.

The record shows that there was a child support agreement in place between petitioner and respondent. Respondent made three

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child support payments totalling \$150.00, under this agreement, and provided \$800.00 on another occasion. Respondent attempted to legitimate the child through judicial proceedings and, with the assistance of counsel, voluntarily dismissed that action. Respondent and petitioner each testified that they spoke of marriage to one another on several occasions. There was sufficient evidence from which the court could conclude that respondent was aware of his legal and moral duty to support his child.

[2] Next, respondent argues that the trial court's findings of fact were not supported by clear and convincing evidence. Respondent failed to make proper objections to these findings of fact. Ordinarily, this would preclude respondent from raising this issue on appeal, and the only question presented for review would be whether the findings support the conclusions of law. *Pierce*, 67 N.C. App. 257, 312 S.E.2d 900. Again, given the serious consequences, we review the merits of respondent's argument.

N.C. Gen. Stat. § 7A-289.32(6)(a)-(d) provides for the putative father to legitimate his child through any one of four possible ways: (1) establish paternity judicially or by affidavit filed in a central registry maintained by the Department of Human Resources; (2) legitimate the child pursuant to provisions of G.S. 49-10, or file a petition for this specific purpose; (3) legitimate the child by marriage to the mother of the child; or (4) provide substantial financial support or consistent care with respect to the child and mother. Upon a finding that the putative father has not attempted any of the four possible ways to legitimate his child, the trial court may terminate parental rights.

The trial court found that respondent failed to legitimate his child in any of the aforementioned ways. The record clearly establishes that respondent failed to establish paternity through judicial process, affidavit, or marriage. Respondent's testimony establishes that any care he provided his child was not consistent. The only possible manner in which he could legitimate his child under the statute is to show that his support was substantial. Even viewing the evidence in the light most favorable to respondent, he provided his child with less than \$1,000.00 over a three year period. This was not "substantial" support sufficient to avoid termination of respondent's paternal rights.

[3] Finally, respondent contends that the trial court should not have found that he did not provide substantial support to the child without

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also finding that he had the means and ability to do so. This argument is also without merit.

N.C. Gen. Stat. § 7A-289.32(6)(d) does not require a finding that the putative father had the means and ability to pay child support. The statute only requires a showing that he in fact did not provide substantial support or consistent care to the child or the mother. More importantly, the order entered shows the trial court *did* find that respondent had the means and ability to support his child and did not.

The trial court did not err, and its order is affirmed.

Affirmed.

Judge WYNN dissents.

Judge JOHN concurs.

Judge WYNN dissenting:

While I agree with the majority's conclusion that respondent failed to provide substantial financial support to the child, there is nothing in the record before us to indicate that it was in the *best interest of the child* to terminate respondent's parental rights. *See, In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 225 (1995) (holding that the trial judge is not required to terminate a parent's rights even though grounds for termination are found to exist; if the best interest of the child requires that the parent's rights not be terminated, the court *must* dismiss the petition).

Terminating the father's parental rights carries with it the ancillary action of terminating his responsibility to provide and support his child. In short, this child's right to seek support from his father is also terminated.¹ Yet, no findings of facts were made by the trial court to support the inherent conclusion that it is in the best interest of this child to cut off the father's responsibility to provide support to him. As this court noted in *Bost v. Van Nortwick*, 117 N.C. App. 1, 449 S.E.2d 911 (1994): "[i]n reviewing this case to determine whether the

1. Moreover, often the State of North Carolina has an interest as to whether a parent's responsibility to support his or her child should be terminated—most notably in instances where the child receives public assistance from the Department of Social Services.

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trial court properly granted petitioner's wish to terminate respondent's parental rights, we must keep in mind that the overriding consideration is the welfare or best interest of the [child], in light of all the circumstances." *Id.* at 7-8, 449 S.E.2d at 915.

Moreover, although in this case the child is represented by a guardian ad litem, there appears to be no evidence to show that the best interest of this child would be to sever all legal connections with his biological father.² In fact, there is no evidence to show that anyone else will stand in this father's stead to support the child.³

A parental rights termination proceeding which in effect terminates a parent's responsibility to provide support for the child should include findings of facts that support the legal conclusion that it is in the best interest of the child to terminate both the parent's responsibility and the child's rights to support. *But cf., In re Caldwell*, 75 N.C. App. 299, 330 S.E.2d 513 (1985). I would therefore remand this proceeding to district court for findings of fact to support the conclusion that it is in the best interest of the child to terminate his father's responsibility to support him.

STATE OF NORTH CAROLINA v. BOBBY NEAL HELMS

No. COA96-1060

(Filed 2 September 1997)

1. Evidence and Witnesses § 2176 (NCI4th)— HGN test—scientific test—qualified expert

A horizontal gaze nystagmus (HGN) test represents specialized knowledge that must be presented to the jury by a qualified expert.

2. It may be that the remaining parent is willing and financially able to accept the full responsibility of supporting the child, in effect holding harmless the termination of the father's responsibility to support. It is further recognized that in many instances the single parent shoulders this responsibility because the other parent refuses or is unable to support the child. The emphasis here, however, is on the termination of the responsibility to support, not the enforcement of that responsibility.

3. In some instances there may be another person who seeks to adopt the child upon the termination of the biological parent's parental rights. In my opinion, the adoption and termination proceedings should be dependent and contingent; thus covering the gap between the time of the termination and adoption.

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2. Evidence and Witnesses § 2176 (NCI4th)— new scientific method of proof—reliability—applicability

A new scientific method of proof is admissible at trial only if the method is sufficiently reliable and the reasoning or methodology is applicable to the facts in issue.

3. Evidence and Witnesses § 2176 (NCI4th)— impaired driving—HGN test—insufficient foundation—admission of results—harmless error

The State failed to present a sufficient foundation for the admission in a DWI prosecution of the results of an HGN test administered to defendant where the trial court did not purport to take judicial notice of the reliability of the HGN test, and no evidence was presented at trial and no inquiry was conducted regarding reliability of the HGN test. However, the admission of the arresting officer's testimony concerning the results of the HGN test was harmless error because the other testimony offered at the trial overwhelmingly established defendant's guilt of DWI where it showed that the officer observed defendant's erratic operation of his vehicle; the officer noticed a strong odor of alcohol emanating from defendant; the officer observed that defendant's speech was "mumbled," he was unsteady on his feet, his eyes were bloodshot, his shirt tail was hanging out, and his clothes were soiled; and defendant failed other sobriety tests administered to him.

Appeal by defendant from judgment entered 24 April 1996 by Judge Howard R. Greeson, Jr. in Union County Superior Court. Heard in the Court of Appeals 14 May 1997.

Attorney General Michael Easley, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Shawna Davis Collins for defendant-appellant.

JOHN, Judge.

Defendant appeals judgment entered upon conviction for driving while impaired in violation of N.C.G.S. § 20-138.1 (1993). He contends the trial court erred by allowing the arresting officer to testify to results of a horizontal gaze nystagmus (HGN) test administered to defendant. While we agree the State failed to lay a proper foundation at trial for admission of the HGN test results, we conclude the error was harmless and uphold defendant's conviction.

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The State's evidence adduced at trial tended to show the following: Officer E.P. Bradley (Bradley) was stopped at an intersection in Monroe, North Carolina, at approximately 4:00 a.m. on 30 December 1995 when defendant drove past. Bradley noticed the tail lights of defendant's automobile were not operating and, while following the vehicle, observed it weave from the left side of its lane of travel to the right, striking the curb with the right front tire. Bradley activated his blue light, and defendant's automobile made a wide right turn onto a side street, veering into the opposite lane before coming to a stop.

Bradley approached the vehicle and noticed a strong odor of alcohol as defendant rolled down the driver's side window. Bradley requested that defendant produce his driver's license, and the latter indicated "he didn't have any license." Bradley noted defendant's speech was "mumbled" and asked him to exit his vehicle. As defendant did so, he was unsteady on his feet. Bradley further observed defendant's eyes were bloodshot, his shirt tail was hanging out, and his clothes were soiled. As defendant sat in the patrol car, Bradley noted a strong odor of alcohol emanating from defendant.

Bradley thereafter administered a HGN test. Nystagmus is a physiological condition that involves

an involuntary rapid movement of the eyeball, which may be horizontal, vertical or rotary. An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words jerking or bouncing) is known as horizontal gaze nystagmus, or HGN.

People v. Leahy, 882 P.2d 321, 323 (Cal. 1994) (citations omitted). The test typically has three components, see *Commonwealth v. Sands*, 675 N.E.2d 370, 372 (Mass. 1997), each of which was contained in the test administered by Bradley to defendant. Bradley directed defendant to focus upon a pen held twelve to fifteen inches from defendant's face as Bradley slowly moved the pen out of defendant's field of vision towards the latter's ear. Bradley sought to observe 1) whether the onset of nystagmus was less than forty five degrees; 2) whether nystagmus, when defendant's eyes were moved as far as possible to one extreme, was moderate or distinct; and 3) whether defendant's eyes were able to move smoothly from side to side as they tracked the pen. See *State v. Breeson*, 554 N.E.2d 1330, 1333 (Ohio 1990) (setting out components of HGN test). Bradley testified that twitching of defendant's eyes during administration of the test would be associated with alcohol intoxication. On redirect examination, Bradley

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stated he had completed a forty hour training class dealing with the HGN test.

Based upon the results of the HGN test, as well as his observations concerning defendant's operation of his vehicle and the odor of alcohol on defendant's breath, Bradley formed the opinion that defendant had consumed a sufficient quantity of alcohol so as to have impaired his mental and physical faculties. Bradley thereupon placed defendant under arrest and transported him to the county jail, where defendant refused administration of an intoxilyzer test.

In a holding cell at the jail and at Bradley's direction, defendant attempted another sobriety measuring test known as the one-legged stand. Defendant was asked to keep his hands at his side while lifting his foot approximately six inches from the floor and counting to thirty. Bradley testified defendant dropped his foot three times and "stopped the test" at the count of fifteen. Further, defendant was unable to keep his hands lowered and swayed from side to side.

Defendant was also directed to perform the walk-and-turn test, in which he was to stand with his hands by his side and walk heel-to-toe down a line, turn, and then return to the starting point in the same fashion. Defendant failed to touch his heels to his toes and swayed, using his hands to maintain his balance.

Defendant presented no evidence at trial.

Following a jury verdict of guilty, defendant was sentenced to a term of two years imprisonment based upon the presence of aggravating factors. Defendant appeals.

The sole argument presented by Defendant is that Bradley's testimony concerning the HGN test was inadmissible. Defendant contends the HGN test is a scientific test and thus admissible only following a proper foundation pursuant to N.C.G.S. § 8C-1, Rule 702 (1992). *See State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990). Because the State failed to lay such a foundation, defendant asserts, the HGN evidence was improperly admitted.

The State responds that Bradley's testimony merely described his first-hand observation of defendant's conduct and was therefore admissible under N.C.G.S. § 8C-1, Rule 701. *See State v. Lindley*, 286 N.C. 255, 258, 210 S.E.2d 207, 210 (1974) (law enforcement officer may present opinion evidence as to defendant's intoxication based upon observation).

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Without doubt, common experience teaches that alcohol affects one's balance, coordination, speech, and ability to recollect. *See Schultz v. State*, 664 A.2d 60, 65 (Md. Ct. Spec. App. 1995). When an officer describes a suspect's behavior in regard to these categories, such testimony is within the understanding of the ordinary juror. *See State v. Anderson*, 85 N.C. App. 104, 108, 354 S.E.2d 264, 266, *rev'd on other grounds*, 322 N.C. 22, 366 S.E.2d 459 (1988) (citation omitted) ("expert testimony usually admitted to explain to juries what they otherwise would not understand"). Some jurisdictions have determined the HGN test to be similar to other field tests which measure behavior commonly associated with intoxication and therefore to require no additional foundation for admission beyond first-hand observation. *See, e.g., State v. Murphy*, 451 N.W.2d 154 (Iowa 1990); *State v. Nagel*, 506 N.E.2d 285 (Ohio Ct. App. 1986); *State v. Sullivan*, 426 S.E.2d 766 (S.C. 1993).

The majority of courts, however, have concluded the HGN test is a scientific test requiring a proper foundation to be admissible. *See, e.g., State v. Superior Court In and For Cochise County*, 718 P.2d 171 (Ariz. 1986); *People v. Leahy*, 882 P.2d 321 (Cal. 1994); *State v. Meador*, 674 So.2d 826 (Fla. Dist. Ct. App.), *review denied*, 686 So.2d 580 (Fla. 1996); *Commonwealth v. Sands*, 675 N.E.2d 370 (Mass. 1997); *Schultz v. State*, 664 A.2d 60 (Md. Ct. Spec. App. 1995); *People v. Erickson*, 156 A.D.2d 760 (N.Y. App. Div. 1989), *appeal denied*, 555 N.E.2d 623 (N.Y. 1990); *City of Fargo v. McLaughlin*, 512 N.W.2d 700 (N.D. 1994); *Commonwealth v. Miller*, 532 A.2d 1186 (Pa. Super. Ct. 1987); *Emerson v. State*, 880 S.W.2d 759 (Tex. Crim. App.), *cert. denied*, 513 U.S. 931, 130 L. Ed. 2d 284 (1994); *State v. Cissne*, 865 P.2d 564 (Wash. Ct. App.), *review denied*, 877 P.2d 1288 (1994).

[1] We agree with the majority view that the HGN test does not measure behavior a lay person would commonly associate with intoxication. Rather,

it is based upon a scientific principle that the extent and manner in which one's eye quivers can be a reliable measure of the amount of alcohol one has consumed.

Schutz, 664 A.2d at 65. The test therefore represents specialized knowledge that must be presented to the jury by a qualified expert pursuant to N.C.G.S. § 8C-1, Rule 702.

[2] The United States Supreme Court, interpreting the Federal Rules of Evidence, has stated there is a presumption inherent in Rule 702

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that “the expert’s opinion will have a reliable basis in the knowledge and experience of his discipline.” *Daubert v. Merrell Dow*, 509 U.S. 579, 592, 125 L. Ed. 2d 469, 482 (1993). Under this state’s rules of evidence, “[a] new scientific method of proof is admissible at trial [only] if the method is sufficiently reliable,” *Pennington*, 327 N.C. at 98, 393 S.E.2d at 852, *i.e.*, if “the reasoning or methodology underlying the [method] is sufficiently valid,” *State v. Goode*, 341 N.C. 513, 527, 461 S.E.2d 631, 639 (1995). *See also Daubert*, 509 U.S. at 590, 125 L. Ed. 2d at 481 n.9 (defining “reliability” in a legal context—“*evidentiary reliability*” is “based upon *scientific validity*”). The court’s “gatekeeping” function in this regard is made necessary by the heightened credence juries tend to give evidence perceived as scientific. *State v. O’Key*, 899 P.2d 663, 672 (Or. 1995) (court must insure persuasive appeal of scientific evidence is legitimate). If reliable, the reasoning or methodology must then be determined to be “properly appli[cable] to the facts in issue.” *Goode* at 527, 461 S.E.2d at 639.

No decision of our appellate courts has addressed the admissibility of HGN evidence. In such circumstance, the trial court may determine reliability “either by judicial notice or from the testimony of scientists who are expert in the subject matter, or by a combination of the two.” *State v. Bullard*, 312 N.C. 129, 148, 322 S.E.2d 370, 381 (1984) (quoting earlier edition of 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 113, at 361 (4th ed. 1993)).

[3] It is well established that

[a] court may take judicial notice of a fact within a field of any particular science which is so notoriously true as not to be the subject of reasonable dispute or is capable of demonstration by resort to readily accessible sources of indisputable accuracy.

Ingold v. Light Co., 11 N.C. App. 253, 256, 181 S.E.2d 173, 174 (1971). In the case *sub judice*, the record contains no indication the trial court purported to take judicial notice of the reliability of the HGN test. *See* N.C.G.S. § 8C-1, Rule 201(e) and (g) (party entitled to be heard on request to take judicial notice; in criminal trial, court must instruct jury it may, but is not required to, accept as conclusive any fact judicially noticed). In addition, no evidence was presented at trial nor any inquiry conducted regarding reliability of the HGN test. Therefore, admission into evidence of Bradley’s testimony concerning results of the HGN test administered to defendant was error.

TOWN CENTER ASSOC. v. Y & C CORP.

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Prior to concluding, we note judicial notice may be taken at the appellate court level. See N.C.G.S. § 8C-1, Rule 201(f). However, we decline the State's invitation to take judicial notice of the "scientific validity," *Daubert* at 590, 125 L. Ed. 2d at 481 n.9, of the HGN test on the record before us. See *State v. Witte*, 836 P.2d 1110, 1121 (Kan. 1992) (declining to rule on admissibility of HGN test prior to opportunity of trial court to weigh disputed facts concerning reliability thereof); see also Charles R. Honts & Susan L. Amato-Henderson, *Horizontal Gaze Nystagmus Test: The State of the Science in 1995*, 71 North Dakota Law Review 671 (1995) (asserting necessity of expert testimony on HGN test prior to holding test sufficiently reliable to be received into evidence).

Notwithstanding improper admission of the HGN test results, the remaining testimony offered at trial as summarized above overwhelmingly established defendant's guilt of the crime of driving while impaired. Accordingly, receipt of the evidence constituted harmless error, and defendant's conviction stands undisturbed. See N.C.G.S. § 15A-1443 (1988) (defendant must show that had error in question not been committed, reasonable possibility exists that different result would have been reached at trial).

No error.

Judges GREENE and WALKER concur.

TOWN CENTER ASSOCIATES, PLAINTIFF v. Y & C CORPORATION, DEFENDANT v.
THE CROSLAND GROUP, INC., COUNTERCLAIM DEFENDANT

No. COA96-1254

(Filed 2 September 1997)

1. Appeal and Error §§ 118, 119 (NCI4th)— summary judgment—not appealable

In an action arising from the termination of a lease, an appeal from the denial of a motion for summary judgment for Y&C and the granting of another against Y&C on its counterclaims was interlocutory. The denial of a motion for summary judgment is not an appealable order, and the summary judgment on Y&C's counterclaims failed to resolve all of the issues between the parties and thus was not a final judgment.

2. Appeal and Error § 91 (NCI4th)— lease termination—summary judgment as to agent—certification by court—erroneous

The trial court's order granting summary judgment on cross-claims against Crosland in an action involving a lease termination failed to resolve all issues between all parties and was not a final judgment despite the trial court's certification pursuant to N.C.G.S. § 1A-1, Rule 54(b) where entry of the summary judgment concluded all claims related to Crosland, but Crosland was a party to the suit only in its capacity as agent of plaintiff and its liability, if any, remained dependent upon the unresolved determination of plaintiff's liability as principal.

3. Appeal and Error § 87 (NCI4th)— lease assignment—summary judgment—interlocutory order—no substantial right lost

Although Y & C was twice placed on notice by plaintiff that Y & C's appeal from two summary judgment orders was challenged as interlocutory, Y & C discussed the issue of substantial right as to one order only by rehashing its arguments that summary judgment should have been allowed in its favor to prevent an unnecessary trial, and at no point addressed the issue of loss of a substantial right as to the other order, thereby failing to meet its burden of showing that the appeal was properly taken. The Court of Appeals' independent review revealed that no substantial right would be lost by delaying appeal until after the final judgment.

4. Appeal and Error § 292 (NCI4th)— interlocutory order—writ of certiorari—denied

The trial court declined to review through grant of a writ of certiorari interlocutory orders denying and granting summary judgments.

Appeal by defendant from orders filed 8 April 1996 by Judge Marcus L. Johnson and 20 August 1996 by Judge James U. Downs in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 May 1997.

Kennedy Covington Lobdell & Hickman, L.L.P., by Alice Carmichael Richey and Joseph W. Moss, Jr. for Plaintiff-Appellee and Counterclaim Defendant-Appellee.

Richard F. Harris, III for Defendant-Appellant.

TOWN CENTER ASSOC. v. Y & C CORP.

[127 N.C. App. 381 (1997)]

JOHN, Judge.

Defendant Y & C Corporation (Y & C) appeals the grant of partial summary judgment to plaintiff, the grant of summary judgment to counterclaim defendant The Crosland Group, Inc. (Crosland), as well as the denial of Y & C's motion for summary judgment. We dismiss the appeal as interlocutory.

Pertinent facts and procedural history are as follows: plaintiff owns Town Center Plaza shopping center in Charlotte. Crosland acts as managing agent for the center. Y & C came into possession of a leasehold in the shopping center by mesne assignments of the lease and operates the Hot Wok Restaurant on the leasehold.

Plaintiff claimed Y & C failed to meet requirements of the sales achievement clause (the clause) in the lease assignment, and informed Y & C in writing 2 February 1995 of its intent to exercise the termination clause contained in the lease. Y & C was directed to vacate the premises on or before 2 April 1995, but failed to do so.

Seeking possession of the premises and damages, plaintiff initiated the instant action against Y & C 17 April 1995. Defendant filed answer and counterclaim 31 July 1995, as well as a motion to join Crosland. Joinder was allowed 6 April 1996.

On 5 January 1996, Y & C moved to dismiss the complaint and for summary judgment on grounds that plaintiff's continued acceptance of rent resulted in waiver of any alleged breach of the lease. The motions were consolidated and denied in an order entered 8 April 1996 (the 8 April order) by Judge Marcus L. Johnson. However, Y & C was allowed to amend its answer to include the affirmative defense of waiver.

As amended, Y & C's answer asserted the following as defenses: (1) plaintiff was equitably estopped from enforcing the clause, (2) the clause was not part of the lease assignment, (3) plaintiff failed to allow Y & C the opportunity allowed by the lease to cure any alleged breach of the clause, (4) plaintiff failed to provide proper notice of termination, and (5) plaintiff waived any alleged breach by acceptance of rent payments. In addition, Y & C counterclaimed against plaintiff for breach of lease, fraud, and unfair or deceptive trade practices. Crosland was cited as a defendant regarding the second and third counterclaims.

TOWN CENTER ASSOC. v. Y & C CORP.

[127 N.C. App. 381 (1997)]

Plaintiff filed reply 8 September 1995 to Y & C's counterclaim, as did Crosland 18 June 1996. On 9 August 1996, plaintiff and Crosland moved for summary judgment on all issues raised by Y & C's counterclaims. The motion of each was granted as to Y & C's second and third counterclaims in an order filed 20 August 1996 (the 20 August order) by Judge James U. Downs, thereby dismissing all claims against Crosland. The court certified pursuant to N.C.G.S. § 1A-1 Rule 54 that it had entered final judgment "as to one or more but fewer than all of the counterclaims or parties, and there is no just reason for delay." Y & C filed timely notice of appeal.

[1] Plaintiff initially argues both in its brief in opposition to the issuance of a writ of certiorari and in its appellate brief that Y & C's appeal is interlocutory. Plaintiff's assertion has merit regarding both the 8 April and the 20 August orders.

The former, denying Y & C's motion for summary judgment, does not qualify as an appealable order. See *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 424, 302 S.E.2d 868, 871 (1983) (citations omitted) ("*denial* of a motion for summary judgment is not appealable"). We therefore do not discuss the 8 April order further.

The 20 August order, granting summary judgment on Y & C's second and third counterclaims, failed to resolve all issues between all parties and thus was not a final judgment, *i.e.*, one which disposed of the case as to all parties, leaving nothing to be judicially determined between them in the trial court. *Atkins v. Beasley*, 53 N.C. App. 33, 36, 279 S.E.2d 866, 869 (1981). Although appeal of right lies from a final judgement, N.C.G.S. § 7A-27 (1995),

[a] grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal.

Liggett Group v. Sunas, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993).

[2] An interlocutory appeal is permissible only under specific statutory exceptions. *Brown v. Brown*, 77 N.C. App. 206, 208, 334 S.E.2d 506, 508 (1985), *disc. review denied*, 315 N.C. 389, 338 S.E.2d 878 (1986). First, N.C.G.S. § 1A-1 Rule 54(b) provides that the trial court

may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment.

TOWN CENTER ASSOC. v. Y & C CORP.

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N.C.G.S. § 1A-1, Rule 54(b) (1990). The effect of the court's action is to permit immediate appeal of the "final" judgment.

Second, N.C.G.S. §§ 1-277 and 7A-27(d) allow an interlocutory appeal when the trial court's order (1) affects a substantial right, (2) in effect determines the action and prevents a judgment from which an appeal might be taken, (3) discontinues an action, or (4) grants or refuses a new trial. N.C.G.S. § 1-277 (1996); N.C.G.S. § 7A-27(d) (1995); *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995).

The 20 August order contained the trial court's certification pursuant to Rule 54(b); however, a trial court cannot "by denominating [its] decree a 'final judgment' make it immediately appealable under Rule 54(b) if it is not such a judgment." *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979). Although entry of summary judgment as to Y & C's counterclaims for fraud and unfair or deceptive trade practices effectively concluded all claims against Crosland, the latter was a party to the suit only in its capacity as agent of plaintiff. Hence, Crosland's liability, if any, to Y & C remained dependant upon determination of plaintiff's liability as principal, which issue has not yet been resolved in the trial court. It cannot fairly be said that delay of appellate review of Crosland's contingent liability would be unjust. Under such circumstance, the trial court's denomination of its judgment as "final" based upon no just reason for delay was error.

[3] We next consider whether defendant may pursue appeal pursuant to G.S. §§ 1-277 and 7A-27. Only the substantial right exception under the sections is potentially applicable here.

Appeal of an interlocutory order based upon impairment of a substantial right requires finding (1) that the right in question qualifies as "substantial," see *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982), and (2) that, absent immediate appeal, the right will be "lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order," *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 6, 362 S.E.2d 812, 815 (1987). The particular facts of each individual case, and the procedural context in which the contested order was entered, govern the latter determination. *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984).

In the case *sub judice*, Y & C has twice been placed on notice by plaintiff that the latter challenges Y & C's appeal of the 20 August

order as interlocutory: first, in plaintiff's "Response In Opposition To [Y & C's] Petition For Writ of Certiorari," and later in the initial argument set out in plaintiff's appellate brief. In its petition for writ of certiorari, Y & C discusses the issue of substantial right only as it affects the 8 April order, and there only in terms of rehashing its arguments that summary judgment should have been allowed in its favor so that an unnecessary trial might be prevented. See *Horne v. Nobility Homes, Inc.*, 88 N.C. App. 476, 478, 363 S.E.2d 642, 643 (1988) (avoidance of trial is not substantial right entitling party to appeal). Y & C at no point addresses the issue of loss of a substantial right in reference to the 20 August order, did not avail itself of the opportunity to file a reply brief for that purpose, see N.C.R. App. P. 28(h), and thus has "failed to meet [its] burden of showing that the appeal [of the 20 August order] has been properly taken." *Hunter v. Hunter*, 126 N.C. App. 705, —, 486 S.E.2d 244, 245 (1997). Notwithstanding such failure, and even though "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order," *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994), our independent review of the record reveals no substantial right of Y & C "will be lost by delaying the appeal until after a final judgment is entered." *Horne*, 88 N.C. App. at 478, 363 S.E.2d at 643.

[4] Y & C also urges us in its petition to exercise our discretionary powers and to review the trial court's interlocutory orders through grant of a writ of certiorari. See N.C.R. App. P. 21(a)(1). We decline to do so. See *Mckinney v. Royal Globe Insur. Co.*, 64 N.C. App. 370, 372, 307 S.E.2d 390, 391 (1983) (citations omitted) (purpose of "rules embodied in G.S. 1-277(a) and 7A-27(d)(1) is to 'prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case *fully and finally* before it is presented to the appellate division' " (emphasis added)).

Appeal dismissed.

Judges GREENE and WALKER concur.

STATE EX REL. HORNE v. HORNE

[127 N.C. App. 387 (1997)]

STATE OF NORTH CAROLINA, BY AND THROUGH ITS CARTERET CHILD SUPPORT ENFORCEMENT
OFFICE, EX. REL. SAMANTHA L. HORNE, PLAINTIFF V. RICHARD LEE HORNE, II, DEFENDANT

No. COA97-38

(Filed 2 September 1997)

**Divorce and Separation § 392.1 (NCI4th)— child support —
live-in boyfriend—deviation from guidelines—appropriate
findings not made**

In an action to establish support for defendant father's minor children, the trial court erred in deviating from the support guidelines codified in N.C.G.S. § 50-13.4(c) where the court ordered defendant to pay less than the amount provided in the guidelines based on findings that the minor children and their mother resided with mother's boyfriend and that he earns \$16.61 per hour and works forty hours per week, but the court did not make the appropriate findings of fact regarding the extent and nature of the support the children received from the mother's live-in boyfriend.

Appeal by plaintiff from order entered 19 September 1996 by Judge Jerry F. Waddell in Carteret County District Court. Heard in the Court of Appeals 11 August 1997.

Samantha and Richard Horne were married on 24 March 1990 and separated 10 March 1995. Two children, Laura and Riley, were born of the marriage and both children live with their mother in the marital home. On 9 April 1996, Carteret County filed a complaint against defendant to establish support and maintenance, as well as health insurance coverage, for the minor children. In addition, Carteret County sought indemnification for all public assistance paid to on behalf of the minor children.

On 3 September 1996, defendant filed a notice he would seek a deviation from the North Carolina Child Support Guidelines (hereinafter "guidelines"). After hearing evidence on defendant's request for a deviation, the trial court entered an order in which it found the parties' combined monthly adjusted gross income of \$2,080.00 resulted in a basic support obligation of \$548.20 per month. With adjustments for health insurance premiums, the total child support obligation, per the child support guidelines, would be \$646.20 per month. The trial court determined, however, that \$498.00 per month would be reasonable child support, and that utilization of the guide-

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lines would be unjust or inappropriate in this case. The trial court based its decision on the fact that Samantha Horne's boyfriend, who earns \$16.61 per hour and works forty hours per week, and his minor child live with her and the minor children. From this order, plaintiff appeals.

Attorney General Michael F. Easley, by Assistant Attorney General Kathleen U. Baldwin, for plaintiff-appellant.

No brief filed for defendant-appellee.

SMITH, Judge.

The issue before this Court is whether the child support order contains sufficient findings of fact to support the trial court's decision to deviate the guidelines. Plaintiff argues, and we agree, it does not.

N.C. Gen. Stat. § 50-13.4(c) (1995), which provides for deviation from the guidelines, states that

upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines.

N.C. Gen. Stat. § 50-13.4(c) (1995). If the trial court determines deviation is warranted, it "shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered." *Id.*; *Gowing v. Gowing*, 111 N.C. App. 613, 432 S.E.2d 911 (1993).

In this case the trial court made the following pertinent findings of fact:

23. . . . Defendant requested that the court hear evidence relating to the reasonable needs of the child or children for support and the relative ability of each party to provide support. Defendant requested that the court vary from the utilization of the child support guidelines. Furthermore, [d]efendant presented

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evidence which did indicate that the utilization of the guidelines would be otherwise unjust or inappropriate in this case.

. . . .

24. . . . It is reasonable that the court order an amount of child support obligation which deviates from the child support guidelines for the reason that the mother Samantha Horne has her boyfriend and his son living with her & the two [children]. The boyfriend earns \$16.61 per hour 40 hrs per week.

Based on these findings, the trial court ordered defendant pay \$498.00 per month in total child support instead of \$646.20.

Plaintiff argues that the mere fact that Samantha Horne's boyfriend lives with her and the minor children and earns money is, without more, insufficient to support deviation from the guidelines. We agree.

Our Supreme Court has determined that "contributions of a third party *may* be used to support deviation from the child support guidelines." *Guilford County ex. rel. Easter v. Easter*, 344 N.C. 166, 171, 473 S.E.2d 6, 9 (1996) (emphasis added). In doing so, the Court noted that

[t]he role of the trial court is to determine whether the reasonable needs of the children are being met and whether imposing the presumptive amount would not meet or would exceed the reasonable needs of the children or would be otherwise inappropriate or unjust. N.C.G.S. § 50-13.4(c). In making this determination, the trial court should have at its disposal any information that sheds light on this inquiry.

Id. at 169-70, 473 S.E.2d at 8. *Easter* makes clear that the trial court may consider third-party contributions which support deviating from the guidelines. When considering third-party contributions, the trial court "must examine the extent and nature of the contributions in order to determine whether a deviation . . . is appropriate considering the criteria for deviation set out in N.C.G.S. § 50-13.4(c)." *Id.* at 171, 473 S.E.2d at 9.

In this case, the trial court's findings of fact establish only that Samantha Horne's live-in boyfriend earns \$16.61 per hour and works forty hours per week. Noticeably absent is an attempt to determine what, if any, contributions her boyfriend makes to the children or the

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household and on what basis. Absent appropriate findings of fact regarding the extent and nature of the boyfriend's contributions in consideration of the criteria identified in N.C. Gen. Stat. § 50-13.4(c), we cannot review the appropriateness of the trial court's decision to deviate from the guidelines.

Moreover, we note that the order also lacks sufficient findings of fact to support the *amount* of child support awarded. As stated above, when the trial court deviates from the presumptive guidelines, it "shall make findings of fact as to the criteria that justify . . . the basis for the amount ordered." N.C. Gen. Stat. § 50-13.4(c) (1995). The findings of fact in this case do not indicate how the trial court arrived at \$498.00 as reasonable child support for the children.

Plaintiff also contends the trial court erred by failing to order defendant to pay his proportionate share of the children's uninsured medical, dental, and orthodontic expenses. In doing so, plaintiff acknowledges that the trial court found defendant had the ability and should pay half of these expenses, but complains that the court failed to incorporate this finding of fact into its conclusions of law and order. The record does not indicate why this finding was omitted from the conclusions of law and order; however, we assume this oversight will be corrected on remand.

For the reasons stated herein, the trial court's order is reversed and remanded. On remand, the trial court shall, consistent with this opinion, redetermine the parties' child support obligations based on the evidence presented at the 11 September 1996 hearing and such other evidence as may be received.

Reversed and remanded.

Judges WYNN and JOHN concur.

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[127 N.C. App. 391 (1997)]

STATE OF NORTH CAROLINA v. JEFFREY MICHAEL PHILLIPS, DEFENDANT

No. COA97-252

(Filed 2 September 1997)

1. Criminal Law § 67 (NCI4th Rev.)— jurisdiction—speeding—dismissal in district court—no superior court jurisdiction

The superior court erred in exercising jurisdiction over defendant's speeding offense where the record revealed that the State had taken a voluntary dismissal on the speeding charge in the district court and there was no evidence that the dismissal was granted pursuant to a plea arrangement with defendant. N.C.G.S. § 15A-1431.

2. Automobiles and Other Vehicles § 845 (NCI4th)— driving while impaired—appreciable impairment—sufficient evidence

The State presented sufficient evidence that defendant was appreciably impaired to support his conviction of DWI under N.C.G.S. § 20-138.1(a)(1) where the arresting officer testified that he observed defendant driving erratically, that defendant had an odor of alcohol about him, and that defendant admitted he had been drinking significantly earlier in the evening.

3. Automobiles and Other Vehicles § 845 (NCI4th)— breathalyzer test—calibration of instrument—use of .10 solution—reliable evidence of intoxication

A breathalyzer test performed on defendant was not invalid because the instrument used for the test was calibrated by using a .10 rather than a .08 stock solution; therefore, a reading of .09 constituted reliable evidence sufficient to support defendant's DWI conviction under N.C.G.S. § 20-138.1(a)(2).

4. Automobiles and Other Vehicles § 849 (NCI4th)— DWI—proof of public highway

The trial court did not err in denying defendant's motion to set aside a DWI verdict based on the defendant's contention that the State did not prove that his offense was committed on a public highway where the record revealed that the arresting officer testified defendant committed the offense on a highway, specifically Highway 70.

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Appeal by defendant from judgments entered 13 November 1996 by Judge Claude S. Sitton in Burke County Superior Court. Heard in the Court of Appeals 25 August 1997.

Attorney General Michael F. Easley, by Associate Attorney General Reuben F. Young, for the State.

C. Gary Triggs and Susan Janney, for defendant appellant.

SMITH, Judge.

Defendant was charged with driving while impaired (DWI) in violation of N.C. Gen. Stat. § 20-138.1 (1993) and speeding 56 in a 35 mile per hour zone in violation of N.C. Gen. Stat. § 20-141 (1993). The record on appeal indicates that at his district court trial, defendant's speeding charge was voluntarily dismissed. Defendant pleaded not guilty to the DWI, but was found guilty of that offense. Defendant appealed to the superior court. Following a trial *de novo*, the jury found defendant guilty of both offenses. The trial court imposed a suspended sentence and a fine for each conviction. From the judgments entered, defendant appeals.

The State's evidence shows that on 23 July 1994, at approximately 2:05 a.m., defendant was operating his vehicle on Highway 70 in Hildebran, North Carolina. Trooper Harold Bryan of the North Carolina State Highway Patrol stopped defendant after he clocked defendant's vehicle traveling 56.6 miles per hour in a 35 mile per hour zone. Prior to stopping the vehicle, Trooper Bryan observed the vehicle weave towards the right shoulder of the roadway, cross over the center line and make jerking movements on the road. When Trooper Bryan stopped the vehicle he observed that defendant had a pronounced odor of alcohol about him. Defendant responded affirmatively when Trooper Bryan asked if he had been drinking that night. Trooper Bryan subsequently placed defendant under arrest. Although defendant refused to take any field sobriety tests, he did submit to a breathalyzer and signed the consent form after Trooper Bryan read defendant his rights. The test revealed defendant had a blood alcohol concentration, or BAC, of 0.09.

[1] Initially, we note in the case *sub judice*, that because the State took a voluntary dismissal at the district court on the speeding charge, that offense was not properly before the superior court for final disposition. The record does not indicate that the State took the voluntary dismissal pursuant to any plea arrangement with

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defendant. *See* N.C. Gen. Stat. § 15A-1432 (1988); *State v. Joseph*, 92 N.C. App. 203, 374 S.E.2d 132 (1988), *cert. denied*, 324 N.C. 115, 377 S.E.2d 241 (1989). Thus, the superior court did not have jurisdiction over the speeding offense. *See* N.C. Gen. Stat. § 15A-1431 (Cum. Supp. 1996).

[2] Defendant first argues that the trial court committed prejudicial error by denying his motion to dismiss on the basis that the State failed to establish essential elements of DWI. Specifically, defendant contends that the State did not prove beyond a reasonable doubt that he was impaired as provided by N.C. Gen. Stat. § 20-138.1(a)(1) or that his BAC was at least 0.08 as provided by N.C. Gen. Stat. § 20-138.1(a)(2). We do not agree.

Before defendant can be convicted under N.C. Gen. Stat. § 20-138.1(a)(1), the State must prove beyond a reasonable doubt that defendant had ingested a sufficient quantity of an impairing substance to cause his faculties to be appreciably impaired. *See State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985). This means a finding that defendant's impairment could be recognized and estimated. *Id.*

In reviewing a trial court's denial of a motion to dismiss this Court must consider the evidence in the light most favorable to the State, giving the State the benefit of all permissible favorable inferences. *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). A review of the record in the light most favorable to the State shows that there was sufficient evidence that defendant was appreciably impaired. Trooper Bryan testified he observed defendant driving erratically and defendant had a pronounced alcohol odor about him on 23 July 1994. Trooper Bryan also testified defendant admitted he had been drinking significantly earlier in the evening. There was sufficient evidence to satisfy the requirements of N.C. Gen. Stat. § 20-138.1(a)(1).

[3] Defendant's contention that the instrument Trooper Bryan used was not properly calibrated to measure a BAC level of 0.08 is not persuasive. The record shows that Trooper Bryan performed the breathalyzer test on the Intoxilyzer 5000 according to the approved methods, and he was qualified to administer the chemical analysis pursuant to N.C. Gen. Stat. § 20-139.1(b) (1993). The instrument was properly calibrated and the calibration check revealed the expected reading of 0.10. The Department of Environment, Health and Natural Resources did not modify the calibration procedure for the

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Intoxilyzer 5000 to utilize a 0.08 stock solution during simulation testing until 1 May 1995.

As the instrument yielded a 0.10 during simulation testing with a 0.10 stock solution, the machine was operating accurately. *State v. Shuping*, 312 N.C. 421, 323 S.E.2d 350 (1984). Subsequent testing of defendant's breath presented a reading that is reliable. *Id.* The fact that the instrument was calibrated using a 0.10 stock solution during simulation testing is inconsequential. Once the trial court determined that the chemical analysis of defendant's breath was valid, then the reading constituted reliable evidence and was sufficient to satisfy the State's burden of proof under N.C. Gen. Stat. § 20-138.1(a)(2). *Id.* The trial court did not err by denying defendant's motion to dismiss.

[4] Defendant next argues that the trial court committed prejudicial error by denying his motion to set aside the jury verdicts as being against the greater weight of the evidence. Defendant contends that the State failed to prove that either offense charged was committed on any public highway. We do not agree.

"Motions to set aside the verdict . . . based upon insufficiency of the evidence are addressed to the discretion of the trial court and refusal to grant them is not reviewable on appeal in the absence of abuse of discretion." *State v. Hamm*, 299 N.C. 519, 523, 263 S.E.2d 556, 559 (1980). A review of the record reveals there was sufficient evidence in the form of Trooper Bryan's testimony to show that defendant committed the offense on a highway, specifically Highway 70. Further, defendant shows no abuse of discretion. We find that the trial court did not err by denying defendant's motion to set aside the DWI verdict. For the reasons which have been previously discussed, there is no need to address the issue of whether the trial court erred by denying defendant's motion to set aside the speeding verdict.

We hold that defendant received a fair trial free of prejudicial error as to the DWI charge. Because the superior court lacked jurisdiction to dispose of the speeding charge, judgment is arrested on the speeding conviction in case number 94 CRS 5958.

No error on the DWI charge; judgment arrested on the speeding charge.

Judges WYNN and JOHN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 19 AUGUST 1997

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| BARRIER v. ROSPATCH LABELS/PAXAR CORP. No. 96-1425 | Ind. Comm. (171885) | Affirmed |
| BRADLEY v. BEST SIGNS & SERVICES No. 96-915 | Ind. Comm. (112198) | Affirmed in part, Reversed in part |
| D.A. v. N.C. DEPT OF HUMAN RES. No. 96-1289 | Mecklenburg (96CVS1641) | Reversed |
| GRIFFIN v. GRIFFIN No. 96-799 | Guilford (84CVD2200) | Affirmed |
| HATHCOCK v. CUNNINGHAM No. 96-440 | Stanly (94CVD191) | No Error |
| IN RE BECK No. 96-1053 | Surry (92J80) (92J81) (92J82) (92J83) | Affirmed |
| KELLY v. FOOD LION, INC. No. 96-1380 | Alamance (95CVS1027) | Reversed and Remanded |
| PRIDGEN v. HUGHES No. 96-1191 | Edgecombe (95CVS0192) | Affirmed |
| STATE v. ALEXANDER No. 96-570 | Mecklenburg (94CRS17620) | No Error |
| STATE v. BARRINGER No. 96-1047 | Mecklenburg (95CRS58900) | No Error |
| STATE v. CATHEY No. 96-1261 | Dare (95CRS3793) (95CRS3794) | No Error |
| STATE v. COOK No. 96-1126 | Mecklenburg (94CRS57612) | No Error |
| STATE v. JOHNSON No. 96-357 | Pasquotank (93CRS4909) | No error in part; judgments vacated |

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| | | and cases remanded for entry of judgment and sentencing on charge of involuntary manslaughter. |
| STATE v. THOMAS No. 96-823 | Pasquotank (93CRS1666) | No error in part; judgments vacated and cases remanded for entry of judgment and sentencing on charge of involuntary manslaughter. |
| TOWN OF CAROLINA BEACH v. GOODMAN No. 96-1221 | New Hanover (96CVS0125) | Affirmed |
| FILED 2 SEPTEMBER 1997 | | |
| FUNDERBURKE v. U.S. AIR, INC. No. 97-198 | Ind. Comm. (379668) | Affirmed |
| GREENE v. CARPENTER No. 96-1276 | Caldwell (92CVS1333) | 3 June 1996 Judgment, No Error. 24 June 1996 Order, Affirmed |
| HIDDEN LAKE ESTATES ASSN. v. HUNT No. 97-202 | Henderson (95CVS795) | Dismissed |
| IN RE SHIREY No. 96-1515 | Cumberland (95J554) | Affirmed |
| MINTON v. MINTON No. 97-253 | Wilkes (96CVD1237) | Dismissed |
| PAGE v. MARSHALL OIL CO. No. 96-1269 | Wake (95CVS2604) | Affirmed in part, Reversed in part and remanded |

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| RILEY v. FAMILY DOLLAR STORES No. 97-82 | Ind. Comm. (142862) | Affirmed in in part; Reversed in part |
| SPEARS v. CENTURA BANK No. 97-125 | Wake (94CVS07999) | Dismissed |
| STATE v. BARTLETT No. 97-139 | McDowell (91CRS2372) | No Error |
| STATE v. BLACK No. 97-149 | Forsyth (96CRS9528) | No Error |
| STATE v. CALDWELL No. 97-221 | Mecklenburg (95CRS085835) (95CRS085836) | Affirmed |
| STATE v. CHASTEN No. 97-81 | Onslow (96CRS250) (96CRS251) (96CRS252) (96CRS254) (96CRS275) (96CRS276) | No Error |
| STATE v. DANIELS No. 96-1424 | Pitt (95CRS30889) (95CRS30890) | No Error |
| STATE v. DENNIS No. 97-197 | Randolph (95CRS63) (95CRS4432) | No Error |
| STATE v. GORDON No. 97-56 | New Hanover (95CRS29966) (95CRS29967) (95CRS29968) (95CRS29969) (95CRS29970) (95CRS29971) (95CRS29972) (95CRS29973) (95CRS29974) (95CRS29975) | No Error |
| STATE v. HOLLIS No. 97-249 | Durham (95CRS13523) | Vacated and Remanded |
| STATE v. JACKSON No. 97-30 | Cleveland (94CRS0009) (94CRS0010) (94CRS0011) | No Error |

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| STATE v. JACKSON No. 97-67 | Forsyth (96CRS3443) | No Error |
| STATE v. KIRKLAND No. 97-379 | Swain (95CRS885) (95CRS1088) | No Error |
| STATE v. LACKEY No. 97-227 | Alexander (95CRS2589) | No Error |
| STATE v. LAMBETH No. 97-34 | Davidson (94CRS14182) (94CRS14183) (94CRS14184) | Affirmed |
| STATE v. MEDLEY No. 97-256 | Guilford (96CRS3189) (96CRS3190) | No error in trial and remanded for correction of the judgments |
| STATE v. ROSENBERG No. 97-176 | Forsyth (96CRS14165) | No Error |
| STATE v. TAILLEUR No. 96-1344 | Onslow (95CRS14440) (95CRS14441) | Dismissed |
| STATE v. WATSON No. 97-295 | Jackson (96CRS1730) | No Error |
| STATE v. WILLIAMS No. 97-239 | Cumberland (95CRS941) | No Error |
| STATE v. WOMACK No. 97-47 | Gaston (96CRS5568) | No Error |
| WHITE v. WHITE No. 97-72 | Guilford (95CVS916) | Dismissed |

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[127 N.C. App. 399 (1997)]

STATE OF NORTH CAROLINA v. THOMAS CLEVELAND BARFIELD

No. COA96-1317

(Filed 16 September 1997)

1. Criminal Law § 666 (NCI4th Rev.)— presentation of evidence—waiver of prior motion to dismiss

When defendant presents evidence at trial, he waives his right on appeal to assert the trial court's error in denying his motion to dismiss at the close of the State's evidence. N.C. R. App. P. 10(b)(3).

2. False Pretenses, Cheats, and Related Offenses § 18 (NCI4th)— false pretense—sufficient evidence

The evidence was sufficient to support defendant's conviction of the crime of false pretense where it tended to show that defendant obtained money for a promise to move a house, did not move the house, and retained the money, and that defendant had contracted with two other persons to move their houses but failed to do so and did not return their money.

3. Criminal Law § 435 (NCI4th Rev.)— prosecutor's argument—defendant's failure to testify—curative instructions

Any improper reference in the prosecutor's closing argument to defendant's failure to testify was cured by the trial court's immediate instruction for the jury to disregard the prosecutor's comment and follow the court's instructions on this point and the court's statement during the charge that defendant's silence was not to influence the jury's decision in any way.

4. Criminal Law § 429 (NCI4th Rev.)— prosecutor's argument—failure to contradict State's evidence

The prosecutor's jury argument in a prosecution for false pretense that defendant "offered you no reason why he did not do that work" was a proper comment on defendant's failure to produce witnesses or exculpatory evidence to contradict the State's evidence.

5. Criminal Law § 473 (NCI4th Rev.)— prosecutor's argument—callousness of defense attorney

The prosecutor's jury argument that "I hope you are not as callous, as not only the defendant, but as reflected in the closing

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argument of his attorney” was not grossly improper and did not entitle defendant to a new trial.

6. Evidence and Witnesses § 340 (NCI4th)— similar bad acts—admissibility to show intent and plan

In a prosecution for false pretense based on defendant’s failure to move the victim’s house after being paid to do so, testimony by two witnesses that defendant failed to move their houses after they had paid defendant to do so was admissible to show the intent and plan of defendant.

Appeal by defendant from judgment entered 19 July 1995 by Judge James E. Ragan, III, in Pitt County Superior Court. Heard in the Court of Appeals 20 August 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Allyson K. Kurzmann, for the State.

Public Defender Robert L. Shoffner, Jr., by Assistant Public Defender Dewey T. O’Kelley, III, for defendant appellant.

SMITH, Judge.

On 25 September 1992, Charles Jones bought a house located on Pitt Community College property. The College required Mr. Jones to remove the house by 1 April 1993, or forfeiture would result.

Mr. Jones contracted with defendant Thomas Cleveland Barfield on 24 October 1992 to move the house for \$8,500.00. Mr. Jones paid a \$1,000 down payment so that defendant could commence work and apply for the necessary permits. Defendant did not work on the house in October or November. Mr. Jones paid the remaining balance of \$7,500 on 11 December 1992.

Subsequently, Mr. Jones discovered the new lot for the house was unsuitable. Thereafter, Mr. Jones purchased a second lot for his house and viewed the site with defendant. Defendant continued to assure Mr. Jones that the house could be moved by the April deadline. However, the house was never moved and Mr. Jones forfeited the \$5,000 he paid for the house.

Defendant retained the money paid by Mr. Jones to move the house. Evidence was presented from other witnesses that defendant also failed to move their houses. In those instances, defendant kept the money as well.

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Appellate review is confined to those exceptions which pertain to the argument presented. *Crockett v. First Fed. Sav. & Loan Assoc. of Charlotte*, 289 N.C. 620, 631, 224 S.E.2d 580, 588 (1976). To obtain appellate review, a question raised by an assignment of error must be presented and argued in the brief. *In re Appeal from Environmental Management Comm.*, 80 N.C. App. 1, 18, 341 S.E.2d 588, 598, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 139 (1986). Questions raised by assignments of error which are not presented in a party's brief are deemed abandoned. *State v. Wilson*, 289 N.C. 531, 535, 223 S.E.2d 311, 313 (1976). Defendant's brief failed to address several assignments of error including numbers 6, 7, and 8. Therefore, these issues are abandoned.

[1] The first question presented by this appeal is whether the trial court erred in denying defendant's motion to dismiss at the close of the State's evidence. Appellate Rule 10(b)(3) states when defendant presents evidence at trial, he waives his right on appeal to assert the trial court's error in denying the motion to dismiss at the close of the State's evidence. *State v. Davis*, 101 N.C. App. 409, 411, 399 S.E.2d 371, 372 (1991). Therefore, this assignment of error need not be addressed.

[2] Second, defendant claims the trial court erred in denying the motion to dismiss at the close of all the evidence. In considering a motion to dismiss at the close of all the evidence, the trial court must view the evidence in the light most favorable to the State. *State v. Taylor*, 344 N.C. 31, 45, 473 S.E.2d 596 (1996). The test of the sufficiency of the evidence is whether a reasonable inference of defendant's guilt can be drawn. *State v. Gainey*, 343 N.C. 79, 85, 468 S.E.2d 227, 231 (1996). The court must determine whether there is substantial evidence of each element of the crime charged. *State v. O'Rourke*, 114 N.C. App. 435, 441, 442 S.E.2d 137, 140 (1994). Substantial evidence includes relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Id.* (citing *State v. Mooneyhan*, 104 N.C. App. 477, 481, 409 S.E.2d 700, 703 (1991)). The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss. *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (citing *State v. Powell*, 299 N.C. 95, 101, 261 S.E.2d 114, 118 (1980)); *State v. Stephens*, 244 N.C. 380, 383-84, 93 S.E.2d 431, 433 (1956)).

The elements of false pretense are:

"(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive,

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(3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another.”

State v. Childers, 80 N.C. App. 236, 242, 341 S.E.2d 760, 764 (1986) (quoting *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980)), *disc. review denied*, 317 N.C. 337, 346 S.E.2d 142 (1986). Viewing the evidence in the light most favorable to the State, there is a reasonable inference defendant falsely represented he would move the house. This inference results from the testimony of two other witnesses who contracted with defendant and obtained the same results. In both of those instances, as well as this case, defendant obtained money for a promise to move their houses, did not move the houses, and retained the money without completing the job. Thus, the motion to dismiss at the close of all the evidence was properly denied.

[3] Next, defendant asserts that the trial court committed reversible error by allowing the prosecutor to argue during closing argument that defendant has a right not to testify. Any reference by the State to a defendant's failure to testify is prohibited. *State v. Reid*, 334 N.C. 551, 559, 434 S.E.2d 193, 199 (1993). In this case, the relevant portion of prosecutor's comments in the transcript is:

These folks—to call this man legitimate businessman, they haven't answered one question. You know, they don't have to answer. They have told you that. His Honor is going to tell you that. The defendant has a right not to testify and exercise that right—

Initially, we note that the above quote is apparently inaccurate in that the period should not be included in the next to the last line. In that event the last sentence would read “His Honor is going to tell you that the defendant has a right not to testify and exercise that right—” A trial court's failure to take the requisite curative measures at the time of the prosecution's improper comments or anytime thereafter constitutes error. *Reid*, 334 N.C. at 557, 434 S.E.2d at 197. The State's improper comment on defendant's exercise of his constitutional right is not cured by later instruction in the court's jury charge. *State v. Thompson*, 118 N.C. App. 33, 42, 454 S.E.2d 271, 276, *disc. review denied*, 340 N.C. 262, 456 S.E.2d 837 (1995).

In contrast, error may be cured by withdrawal of the remark or by an immediate statement from the court that it was improper, followed by a jury instruction to disregard it. *Id.* In this case, the prosecutor was attempting to give the law as it would be instructed by the

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judge during the jury charge. Thereafter, the assistant public defender objected, made a motion to strike, and made a motion for a mistrial. Judge Ragan immediately stated to the jury he would "tell [them] what the law is in that regard and listen to [the judge] and follow the law as [he] gives[s] it to [them] on that point." With this curative instruction, the jury was put on notice to listen to the law the judge would give concerning defendant's failure to testify, and to disregard comments of prosecutor. Therefore, any improper reference to defendant's failure to testify was cured.

Furthermore, during the jury instructions the judge stated defendant's decision not to testify creates no presumption against him. The judge went even further and stated defendant's silence is not to influence the jury's decision in any way. Since the judge took the necessary curative measures immediately after the comment and during jury instructions, the error was cured.

In addition, comment on an accused's failure to testify does not call for an automatic reversal. *Reid*, 334 N.C. at 557, 434 S.E.2d at 198 (citing *United States v. Hasting*, 461 U.S. 499, 76 L. Ed. 2d 96 (1983)). Instead, the comment requires the court to determine if the error is harmless beyond a reasonable doubt. *Id.* The evidence against defendant in this case, including testimony of two other witnesses, establishes that the argument was harmless beyond a reasonable doubt. From the evidence presented, the jury could have reasonably concluded defendant was guilty.

[4] Defendant also claims the trial court erred when it allowed the prosecutor to state that defendant "offered you no reason why he did not do that work." "The prosecution may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State." *Reid*, 334 N.C. at 555, 434 S.E.2d at 196 (citing *State v. Mason*, 315 N.C. 724, 732, 340 S.E.2d 430, 436 (1986)). This statement falls into this category. Therefore, the trial court did not err in allowing this statement.

[5] Defendant also claims the trial court erred when it allowed the prosecutor to argue to the jury: "I hope you are not as callous, as not only the defendant, but as reflected in the closing argument of his attorney—" It is well established that a trial attorney may not make uncomplimentary comments about opposing counsel. *State v. Sanderson*, 336 N.C. 1, 10, 442 S.E.2d 33, 39 (1994) (citing *State v. Miller*, 271 N.C. 646, 658-59, 157 S.E.2d 335, 346 (1967)). However, whether counsel has abused the wide latitude accorded closing argu-

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ment is a matter ordinarily left to the sound discretion of the trial judge. *State v. Thompson*, 118 N.C. App. 33, 43, 454 S.E.2d 271, 277 (citing *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980)), *disc. review denied*, 340 N.C. 262, 456 S.E.2d 837 (1995). The exercise of this discretion will not be reviewed on appeal “unless there be such gross impropriety in the argument as would likely influence the verdict of the jury.” *Id.* A new trial is awarded only in cases of extreme abuse. *State v. Bailey*, 49 N.C. App. 377, 384, 271 S.E.2d 752, 756 (1980), *disc. review denied*, 301 N.C. 723, 276 S.E.2d 288 (1981). In this case, there was no abuse of discretion and therefore the trial judge’s ruling will not be disturbed.

[6] Finally, defendant contends the trial court erred by allowing “similar bad act” evidence outside the scope of N.C. Gen. Stat. § 8C-1, Rule 404(b). Two witnesses testified they also contracted with defendant to move their houses with the same results as in this case. Neither house was moved and defendant did not return their money. Rule 404(b) states that evidence of other crimes, wrongs, or acts is not admissible to prove character conformity, but may be admissible for other purposes. *See State v. Childers*, 80 N.C. App. 236, 243, 341 S.E.2d 760, 765 (1986). These other purposes include proof of motive, intent, plan, and knowledge. *Id.* In this case, the testimony of the two witnesses was used to show the intent or plan of defendant. Therefore, this testimony is admissible for such purpose.

Furthermore, exclusion of evidence under N.C. Gen. Stat. § 8C-1, Rule 403 is a balancing test within the sound discretion of the trial court. *State v. Schultz*, 88 N.C. App. 197, 203, 362 S.E.2d 853, 857 (1987), *aff’d*, 322 N.C. 467, 368 S.E.2d 377 (1988). The ruling will not be disturbed absent an abuse of discretion. *Id.* In this situation, the trial judge found the evidence was more probative than prejudicial. Therefore, the evidence of similar acts is admissible.

For the foregoing reasons, we find that the defendant’s trial was free from prejudicial error.

No prejudicial error.

Judges WYNN and JOHN concur.

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ERIE INSURANCE GROUP, PLAINTIFF-APPELLEE v. DONALD R. BUCKNER AND
GORDON WESTON, SR., DEFENDANTS-APPELLANTS

No. COA96-996

(Filed 16 September 1997)

**Insurance § 725 (NCI4th)—homeowner's insurance—assault
at golf course—intended or expected exclusion**

Under Virginia law, the “expected or intended” injury exclusion in a homeowner's policy precluded liability coverage under the policy for an assault claim against the insured growing out of an altercation at a golf course where the insured admitted that he struck the claimant in the head with his fist, notwithstanding the insured alleged that he acted in self-defense.

Judge TIMMONS-GOODSON concurring.

Appeal by defendant Donald R. Buckner from order entered 13 May 1996 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 24 April 1997.

Cranfill, Sumner & Hartzog, L.L.P., by Robert H. Griffin, for plaintiff-appellee.

Evans West & Woods, P.A., by Phillip K. Woods, for defendant-appellant Donald R. Buckner.

WYNN, Judge.

Erie Insurance Group (“Erie”) brought this declaratory judgment action seeking a declaration of its rights and duties under a homeowner's insurance policy issued to Donald R. Buckner. This controversy arises out of an incident involving Buckner at a golf course in Dare County, North Carolina.

On 21 January 1995, Buckner participated in a golf tournament at the Sea Scape Golf Course. Immediately behind Buckner's foursome on the golf course was a group of three, including Gordon Weston, Sr. At the eleventh hole, Buckner picked up Weston's golf ball which had rolled near him and put it in his pocket. A fight ensued between Buckner and Weston and both parties' version of the incident differs.

Buckner contends that Weston's group had been heckling, crowding and rushing his group since the fourth hole; that he picked up

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Weston's ball to stop him from hitting it into his group; that Weston then became irate and verbally abusive and walked straight into him; and that he pushed Weston away causing him to stumble and fall. Buckner states that he struck Weston in the forehead with his fist in self-defense when Weston got up and charged back at him.

On the other hand, Weston contends that Buckner had been drinking that day, had picked up his golf ball on previous occasions, and had instigated the fight. Weston sued Buckner alleging that he unlawfully, willfully, and maliciously committed an assault with the deliberate intent to injure him.

Faced with that lawsuit, Buckner demanded under his homeowner's insurance policy that Erie defend him in the litigation and provide him with coverage for any damages owed to Weston. In response, Erie brought this declaratory judgment action contending that it had no duty under the policy to either defend Buckner or cover his damages arising out of the golfing incident.

Following motions by both parties for summary judgment, the trial court ruled in favor of Erie. Buckner appealed.

On appeal, Buckner argues that the trial court erred by ruling as a matter of law that Erie has no obligation to provide insurance coverage for the 21 January 1995 incident and no duty to defend Buckner in the pending litigation with Weston. We disagree.

The personal liability coverage section of Buckner's homeowner's insurance policy with Erie provides in relevant part that:

We will pay all sums up to the amount shown on the Declarations, which anyone we protect becomes legally obligated to pay as damages because of personal injury or property damage resulting from an occurrence during this policy period. . . . If anyone we protect is sued for damages because of personal injury or property damage covered by this policy, we will provide a defense with a lawyer we choose, even if the allegations are not true.

This section specifically excludes from coverage "[p]ersonal injury or property damage expected or intended by anyone we protect."

The parties agree and we confirm that Virginia law governs our interpretation of the subject policy because Erie issued the policy in that State. *See Roomy v. Allstate Ins. Co.*, 256 N.C. 318, 123 S.E.2d

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817 (1962).¹ Under Virginia law, “[e]xclusionary language in an insurance policy will be construed most strongly against the insurer and the burden is upon the insurer to prove that an exclusion applies.” *Smith v. Allstate Ins. Co.*, 403 S.E.2d 696, 697 (Va. 1991) (quoting *American Reliance Insurance Co. v. Mitchell*, 385 S.E.2d 583, 585 (Va. 1989)). The intentional acts exclusion of the policy in the subject case is common to many personal liability policies and unambiguously excludes coverage for injuries that the insured expects or intends to cause. See *Fuisz v. Selective Ins. Co. of America*, 61 F.3d 238 (4th Cir. 1995); *Commercial Union Ins. Co. v. Mauldin*, 62 N.C. App. 461, 303 S.E.2d 214 (1983). As to the insurer’s duty to defend, “[w]hen an initial pleading ‘alleges facts and circumstances, some of which would, if proved, fall within the risk covered by the policy,’ the insurance company is obliged to defend its insured.” *Fuisz*, 61 F.3d at 242 (quoting *Parker v. Hartford Fire Ins. Co.*, 278 S.E.2d 803, 804 (Va. 1981)). Thus, it follows that “an insurer is excused from its duty to defend the insured only where the complaint against the insured clearly demonstrates no basis upon which the insurer could be required to indemnify the insured under the policy.” *Id.*

The complaint in the subject case alleges that “the defendant unlawfully, wilfully, and maliciously committed an assault upon the plaintiff” and that it was made “with a deliberate intent on the part of the defendant to injure the plaintiff.” Buckner argues that even though the complaint alleges an intentional tort, it does not necessarily fall clearly within the insurance policy’s “intended or expected” exclusion. He points out that in *Russ v. Great American Ins. Companies*, 121 N.C. App. 185, 464 S.E.2d 723 (1996), *disc. review denied*, 342 N.C. 896, 467 S.E.2d 905 (1996), we said: “Actions for battery protect against ‘intentional and unpermitted contact with one’s person.’ The intent required to prove battery is intent to act, i.e., the intent to cause harmful or offensive contact, not the intent to injure.” *Id.* at 188, 464 S.E.2d at 725 (citation omitted). Thus, he argues, the complaint does not clearly demonstrate that the exclusion would preclude coverage and therefore, Erie would not be relieved of its duty to defend.

However, the record indicates that there is no dispute between the parties that Buckner struck Weston in the forehead with his fist.

1. However, we also find North Carolina cases instructive since North Carolina law is substantially similar to Virginia law concerning the legal standards determining coverage, exclusions and duties of defense.

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Even assuming *arguendo* that Buckner did not *intend* to injure Weston, he should have *expected* that an injury was likely to occur. Therefore, we hold that the exclusion for *expected or intended* injuries precludes coverage under the policy.

Buckner further argues that because he alleged that he acted in self-defense, his actions do not fall within the “expected or intended” exclusion. While it appears that neither the Virginia nor North Carolina state courts have directly considered this issue, for guidance we note that the United States District Court for the Middle District of North Carolina in addressing this issue has stated that:

[S]elf-defense is a plea by way of justification or excuse for an intentional killing and admits the intentional nature of the action. We find, therefore, that the injury was intentionally inflicted and that the insurance company has no duty to defend the suit against it in the state court since the facts alleging intentional injury in that suit do not bring the case within the coverage of the policy.

Stout v. Grain Dealers Mut. Ins. Co., 201 F. Supp. 647, 651 (M.D.N.C.), *aff’d*, 307 F.2d 521 (4th Cir. 1962). Moreover, the Virginia Supreme Court has noted that: “In the law, there are many situations in which a person may intentionally injure or kill another and not be subject to criminal punishment. For example, an individual may kill in self-defense This conduct is intentional but it is also excusable.” *Johnson v. Insurance Co. of North America*, 350 S.E.2d 616, 621 (Va. 1986). Thus, we conclude that an allegation of self-defense does not negate the element of intent for a particular act; rather it justifies or excuses the act. Accordingly, we hold that Buckner’s defense of self-defense has no effect on the applicability of the “intended or expected” exclusion of his insurance policy.

In sum, we hold that Buckner should have expected that punching Weston in the face would cause injury and therefore, the “intended or expected” exclusion precludes coverage of the incident under the Erie insurance policy. Since an insurer is relieved of the duty to defend “when it clearly appears from the initial pleading the insurer would not be liable under the policy contract for *any* judgment based upon the allegations,” *Reisen v. Aetna Life and Cas. Co.*, 302 S.E.2d 529, 531 (Va. 1983), the trial court properly held that the 21 January 1995 incident was not covered under the terms of the homeowner’s policy and Erie had no duty to defend Buckner in the pending litigation. Accordingly we affirm the trial court’s order of summary judgment in Erie’s favor.

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Affirmed.

Judge GREENE concurs.

Judge TIMMONS-GOODSON concurs in the result with separate opinion.

Judge TIMMONS-GOODSON concurring.

I agree with the majority that the trial court did not err in granting Erie's motion for summary judgment, because the law of the state of Virginia must be applied to these facts. However, the issue of the apparent inability of one to defend oneself against a perceived threat concerns me. I believe that injury resulting from an act taken in self-defense is not *intended* nor *expected* as these terms are commonly understood. The exigency of the circumstances necessitating one to defend oneself deprives one of any opportunity to calculate whether the actions taken in defense would result in injury to the attacker. Further, one should not be required to engage in such an exercise when confronted with an imminent attack.

JOANN S. BECKER, PLAINTIFF-APPELLEE v. ARTHUR F. BECKER,
DEFENDANT-APPELLANT

No. COA96-1292

(Filed 16 September 1997)

1. Divorce and Separation § 145 (NCI4th)— equitable distribution—unequal distribution—need for residence—inability to earn income—no other place to live

The trial court's finding that the wife needed to occupy and own the marital home and household effects based on her lack of ability to earn an income with which to purchase a residence or furniture was a proper distributional factor for the court to consider in determining that an unequal division of the marital estate was equitable. However, the court's finding that the wife has no other place to live other than the marital residence was not a proper distributional factor because it does not relate to the economic condition of the marriage.

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[127 N.C. App. 409 (1997)]

2. Divorce and Separation § 165 (NCI4th)— equitable distribution—delayed distributive award

The trial court abused its discretion in an equitable distribution proceeding by ordering plaintiff to pay a distributive award which cannot be completed within six years after the divorce of the parties where the court did not make findings that legal or business impediments, or some overriding social policy, prevent completion of the distribution within six years; the award was not crafted to assure completion of payment as promptly as possible; and the way the award is crafted, defendant may never receive the total interest accumulated on the award and none of the principal.

3. Divorce and Separation § 135 (NCI4th)— equitable distribution—value of residence—adjustment for necessary repairs

The evidence in an equitable distribution proceeding, including testimony by two expert witnesses, supported the trial court's adjustment of the value of the marital home downward to reflect the amount of necessary repairs to the home. Repairs necessary to make a home marketable are relevant in determining fair market value because needed repairs have a direct impact on what a buyer would be willing to pay.

4. Divorce and Separation § 147 (NCI4th)— equitable distribution—dental debt—not marital debt

The trial court properly concluded that defendant's dental debt which was incurred prior to the parties' separation was not a marital debt where the evidence presented at trial revealed that the dental work was performed on defendant and the debt was incurred for defendant's benefit only rather than for the parties' joint benefit.

Appeal by defendant from judgment entered 8 April 1996, nunc pro tunc for 10 January 1996, by Judge Louis F. Foy, Jr. in Onslow County District Court. Heard in the Court of Appeals 2 June 1997.

Hiram C. Bell, Jr. and M. Lynn Smith for plaintiff-appellee.

Lana Starnes Warlick and Laura P. Graham for defendant-appellant.

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McGEE, Judge.

Defendant appeals a judgment for equitable distribution. On 7 August 1995, plaintiff and defendant obtained an absolute divorce which reserved equitable distribution for a later hearing. The equitable distribution claims were tried 10 January 1996. In a judgment entered 8 April 1996, nunc pro tunc for 10 January 1996, the trial court: (1) ruled an unequal distribution of the marital estate was equitable based on several factors; (2) determined the net fair market value of the marital home, based on the value specified in a written appraisal less \$4000 in necessary repairs; (3) awarded the marital home to plaintiff and ordered she pay defendant a distributive award secured by a second mortgage on the home payable to defendant, and (4) determined a debt for dental work performed on defendant was defendant's separate debt. Defendant appeals from the judgment.

[1] Defendant first contends the trial court's determination that an unequal distribution of the marital estate was equitable is reversible error because it is based on two impermissible factors, both of which relate to plaintiff's need to occupy the marital home.

N.C. Gen. Stat. § 50-20(c) requires the trial court to distribute the marital property equally unless it determines an equal division is not equitable. G.S. § 50-20(c) (1995); *Coleman v. Coleman*, 89 N.C. App. 107, 109, 365 S.E.2d 178, 180 (1988). The trial court's conclusions in support of an equitable but unequal division will not be disturbed on appeal unless there was a clear abuse of discretion. *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). In addition to several factors required to be considered by the trial court, G.S. § 50-20(c) provides the court shall also consider: "(12) Any other factor which the court finds to be just and proper." G.S. § 50-20(c)(12). The only considerations which are " 'just and proper' within the meaning of section 50-20(c)(12) are 'those which are related to the marital economy.' " *Burnett v. Burnett*, 122 N.C. App. 712, 716, 471 S.E.2d 649, 652 (1996) (quoting *Smith v. Smith*, 314 N.C. 80, 87, 331 S.E.2d 682, 687 (1985)). This Court has held "[t]he need of a spouse to occupy the marital residence, unless it involves a spouse with custody of the children . . . does not relate to the economic condition of the marriage and is not properly considered as a distributional factor." *Burnett*, 122 N.C. App. at 716, 471 S.E.2d at 652.

The court's findings of fact challenged by defendant are:

13. . . . :

* * *

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(e) That the Plaintiff has no other place to live other than the marital residence . . . ;

(f) That the Plaintiff has a high school education but has no special training or skills in order to afford her the opportunity to become employed and to earn an income with which to purchase any residence or any furniture and therefore she is in need of occupying and owning the marital residence and the majority of the household effects.

In finding of fact number 13(f) we find no error in the court's reliance on plaintiff's need to occupy and own the marital home based on her lack of earning potential. Our Court has held a trial court may consider a party's earning potential as a factor justifying an unequal division of marital property. *Harris v. Harris*, 84 N.C. App. 353, 359, 352 S.E.2d 869, 873 (1987). In finding number 13(f), the court also found plaintiff needed to occupy and own the marital home and household effects based on her lack of ability to earn an income with which to purchase a residence or furniture. Since this finding concerns plaintiff's earning potential, it is proper under *Harris*, *see id.* and relates to the marital economy as required by *Smith* and *Burnett*. *See Smith*, 314 N.C. at 87, 331 S.E.2d at 687; *Burnett*, 122 N.C. App. at 716, 471 S.E.2d at 652. However, the court's finding in 13(e) that "[p]laintiff has no other place to live other than the marital residence" was not proper under *Smith* and *Burnett* because it does not relate to the economic condition of the marriage.

Plaintiff contends, however, that the court's consideration of a single improper distributional factor does not require reversal because any one of the other factors found is sufficient to support the determination. We disagree. Although "the finding of a single distributional factor under N.C. Gen. Stat. § 50-20(c) may support an unequal division," *Jones v. Jones*, 121 N.C. App. 523, 525, 466 S.E.2d 342, 344, *disc. review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996), the trial court must exercise its discretion in assigning the weight each factor should receive and then make an equitable division by balancing the evidence in light of the legislative policy favoring equal division. *White*, 312 N.C. at 777, 324 S.E.2d at 833. Since on review we cannot determine the weight assigned by the trial court to the various factors listed in the findings, we must reverse and remand to the trial court for reassessment of its decision to order an unequal division without considering the improper factor listed in finding 13(e).

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[2] The remaining assignments of error argued by defendant could recur on remand and we therefore address defendant's contentions on these issues. Defendant first contends the trial court erred by ordering a distributive award which cannot be completed within six years after the divorce of the parties. N.C. Gen. Stat. § 50-20(e) provides:

In any action in which the court determines that an equitable distribution of all or portions of the marital property in kind would be impractical, the court in lieu of such distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

G.S. § 50-20(e) (1995). Our Court has held that G.S. § 50-20(b)(3), which defines "distributive award," authorizes the trial court "to make distributive awards for periods of 'not more than six years after the date on which the marriage ceases,' except upon a showing by the *payor* spouse that legal or business impediments, or some overriding social policy, prevent completion of the distribution within the six-year period." *Lawing v. Lawing*, 81 N.C. App. 159, 184, 344 S.E.2d 100, 116 (1986). Our court later held the trial court has "a concurrent duty . . . to affirmatively find" the existence of these grounds for extending the payment period beyond six years. *Harris*, 84 N.C. App. at 363, 352 S.E.2d at 876. We upheld a distributive award paid over a ten-year period as supported by the requisite findings under *Harris* in *Smith v. Smith*, 111 N.C. App. 460, 514-17, 433 S.E.2d 196, 229-30, *disc. review of issues additional to those in dissenting opinion denied*, 335 N.C. 177, 438 S.E.2d 202 (1993), *reversed in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994). In addition, we have also stated that "awards for periods longer than six years, if necessary, should be crafted to assure completion of payment as promptly as possible." *Lawing*, 81 N.C. App. at 184, 344 S.E.2d at 116.

Here, the trial court ordered plaintiff to pay a distributive award of \$23,803 plus interest at the rate of seven percent per annum with monthly payments of \$143.86 to begin 1 January 2002 (or the first day of the first month after the house mortgage is paid, if sooner). Under these terms, unless plaintiff prepays her mortgage, she will not start making payments on the award until more than six years after the parties' divorce on 7 August 1995. Yet, the trial court did not make the

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requisite findings, under *Harris*, that legal or business impediments, or some overriding social policy, prevent completion of the distribution within six years. The award was also not “crafted to assure completion of payment as promptly as possible.” See *Lawing*, 81 N.C. App. at 184, 344 S.E.2d at 116. Unless plaintiff prepays her first mortgage, by the time she begins paying the distributive award in January 2002, the \$1726.32 annual total of the monthly payments ordered by the court will not even equal the annual interest payment on the balance. If plaintiff pays only the monthly amounts ordered by the court beginning in January 2002, she may never pay the award in full, and defendant may never receive the total interest accumulated on the award, much less any of the principal. An abuse of discretion occurred in ordering an unduly delayed distributive award.

[3] Defendant next contends the fair market value of the marital home determined by the trial court was not supported by the evidence. In its valuation, the court relied in part on a written appraisal of \$66,000 which the court found included \$4900 worth of necessary repairs. Based on the testimony of two expert witnesses, the court then adjusted the value stated in the written appraisal downward to \$62,000 to reflect an additional \$4000 of necessary repairs. We find sufficient evidence to support this adjustment by the trial court. In addition, we find no merit in defendant’s contention that necessary repairs should not be accounted for when sale of the home is not imminent. Fair market value has been defined as “‘the price which a willing buyer would pay to purchase the asset on the open market from a willing seller, with neither party being under any compulsion to complete the transaction.’” *Carlson v. Carlson*, 127 N.C. App. 87, 487 S.E.2d 784, 786 (1997) (quoting Brett R. Turner, *Equitable Distribution of Property* § 7.03, at 505 (2d ed. 1994)). Repairs necessary to make a home marketable are relevant in determining fair market value because needed repairs have a direct impact on what a buyer would be willing to pay. This assignment of error is without merit.

[4] Defendant further argues an abuse of discretion by the trial court in its finding that a debt for defendant’s dental work was defendant’s separate debt. “A marital debt . . . is one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties.” *Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210, *disc. review denied*, 336 N.C. 605, 447 S.E.2d 392 (1994). “‘The party who claims that any debt is marital bears the burden of proof on that issue.’” *Riggs v. Riggs*, 124 N.C.

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App. 647, 652, 478 S.E.2d 211, 214 (1996) (quoting *Tucker v. Miller*, 113 N.C. App. 785, 791, 440 S.E.2d 315, 319 (1994)), *disc. review denied*, 345 N.C. 755, 485 S.E.2d 297 (1997). The party so claiming must prove “the value of the debt on the date of separation and that it was ‘incurred during the marriage for the joint benefit of the husband and wife.’” *Miller v. Miller*, 97 N.C. App. 77, 79, 387 S.E.2d 181, 183 (1990) (quoting *Byrd v. Owens*, 86 N.C. App. 418, 424, 358 S.E.2d 102, 106 (1987)). Here, although plaintiff testified the bill was received after the date of separation, the court found and all the evidence shows, the dental debt was incurred prior to the parties’ separation on 24 April 1994. The determinative issue then is whether defendant met his burden of showing this debt was for the joint benefit of the parties. In this case, the evidence that the debt was for work performed on defendant and that the bill was in defendant’s name was sufficient to show the debt was incurred for defendant’s benefit only rather than for the joint benefit of the parties. In contrast, defendant presented no evidence tending to show the debt was incurred for the parties’ joint benefit. We hold defendant did not meet his burden of showing this was a marital debt and the trial court did not err in classifying this debt as separate.

Based upon our disposition of these issues, it is unnecessary to address defendant’s remaining assignment of error.

Affirmed in part, reversed in part and remanded.

Judges EAGLES and SMITH concur.

C. THOMAS ROSS, PLAINTIFF V. ROBIN LEEGER VOIERS, DEFENDANT

No. COA96-1313

(Filed 16 September 1997)

**1. Divorce and Separation § 449 (NCI4th)— child support—
agreement to pay college expenses—validity**

A consent order requiring plaintiff father to pay the post-majority college expenses for his daughter attendant to a four-year college degree was valid and enforceable by contempt.

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2. Divorce and Separation § 424 (NCI4th)— child's college expenses—consent order—willfulness of failure to pay—civil contempt

There was sufficient evidence of willfulness to support the trial court's order finding plaintiff father in civil contempt for failure to comply with a consent order requiring him to pay his daughter's college expenses where the evidence showed that plaintiff had the ability to pay the college expenses but deliberately and stubbornly refused to do so when his daughter returned for her junior year, and that he sought to alter his obligation under the consent order without court approval.

Judge GREENE concurring.

Appeal by plaintiff from order and judgment entered 24 June 1996, *nunc pro tunc* 4 January 1996 by Judge Chester C. Davis in Forsyth County District Court. Heard in the Court of Appeals 1 May 1997.

C. Thomas Ross, plaintiff-appellant, pro se.

Stern, Graham & Klepfer, L.L.P., by William A. Eagles and Ronda L. Lowe, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Plaintiff C. Thomas Ross and defendant Robin Leeger Voiers entered into a separation agreement on 19 July 1978. This agreement obligated plaintiff to pay for the college expenses of his daughter, "not [to] exceed on an annual basis ten percent (10%) of [his] gross annual income for that year." A subsequent consent order was entered on 31 January 1990 providing that plaintiff would "pay all college expenses attendant to a four year college degree" for his daughter.

Plaintiff paid his daughter's freshman (1991-92) and sophomore (1992-93) years expenses. However, due to her various personal and financial problems, plaintiff's daughter did not return to school during the following academic year (1993-94).

Plaintiff's daughter enrolled in college in the fall of 1994. The expenses for her junior year (1994-95) of college were paid from money loaned to her by defendant and student loans. Plaintiff did not pay any of his daughter's expenses during that academic year. As a result, defendant filed a motion in the cause, requesting that an order

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be issued for plaintiff to show cause, if any, why he should not be held in contempt for his noncompliance with the 31 January 1990 consent order. Defendant also requested that plaintiff be ordered to pay defendant's reasonable costs and attorney's fees.

After hearing the arguments of counsel and reviewing all of the evidence before him, Judge Chester C. Davis entered an order and judgment on 24 June 1996, *nunc pro tunc* 4 January 1996, denying plaintiff's motion to dismiss, finding plaintiff in civil contempt for willful failure to pay expenses associated with his daughter's junior year in college, denying defendant's motion for attorney's fees, and deferring ruling on defendant's motion for costs. The court provided that plaintiff could purge his contempt by the payment of certain sums of money in order to reimburse defendant and his daughter for sums paid. Plaintiff appeals; and for the reasons stated herein, we affirm the order and judgment of the trial court.

[1] Plaintiff first assigns as error the trial court's denial of his motion to dismiss. Specifically, plaintiff argues that the provisions of the January 1990 consent order requiring him to pay post-majority support are void and unenforceable, and thus the court erred in denying his motion to dismiss. We cannot agree.

It is well-settled that "a parent can assume contractual obligations to his child greater than the law otherwise imposes[,] . . . [i.e.,] a parent may expressly agree to support his child after emancipation and beyond majority, and such agreements are binding and enforceable." *Williams v. Williams*, 97 N.C. App. 118, 122, 387 S.E.2d 217, 219 (1990) (citations omitted); see *White v. White*, 289 N.C. 592, 223 S.E.2d 377 (1976). In the instant case, the parties entered into a consent order on 31 January 1990 which provided that plaintiff would pay all college expenses for his daughter. Subsequently, however, plaintiff failed to do so, and this action was instituted. While plaintiff argues to the contrary, this action is not controlled by section 50-13.4(c) of the North Carolina General Statutes. Instead, this action is controlled by a line of cases affirming a parent's right to consent to provide support greater than that which is required by the law. Plaintiff's reliance on *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983), is misplaced. Notwithstanding that the North Carolina Supreme Court, in *Walters*, addressed the treatment of *separation agreements*, and not a consent order, as is involved in the instant case, the Court clearly stated, "[C]ourt ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judg-

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ment in a domestic relations case.” *Id.* at 307 N.C. 381, 386, 298 S.E.2d 338, 342. As plaintiff contracted in a valid consent order to pay all college expenses for his daughter, and subsequently failed to do so, the trial court did not err in denying plaintiff’s motion to dismiss this action.

[2] Plaintiff next assigns as error the trial court’s finding that he was in civil contempt because his failure to pay was not willful. Plaintiff contends that although he deliberately refused to pay his daughter’s junior year college expenses, he was not in contempt of court based on the record in this case. We do not agree.

While a strict reading of North Carolina General Statutes section 5A-21 does not require that a defendant’s conduct be willful in order for him/her to be found in civil contempt, our courts have interpreted the statute to require an element of willfulness. *Smith v. Smith*, 121 N.C. App. 334, 336, 465 S.E.2d 52, 53-54 (1996) (citing *Henderson v. Henderson*, 307 N.C. 401, 408, 298 S.E.2d 345, 350 (1983)); see N.C. Gen. Stat. § 5A-21 (1986). In *Hancock v. Hancock*, this Court stated,

“Willful” has been defined as “disobedience ‘which imports knowledge and a stubborn resistance,’ and as ‘something more than an intention to do a thing. It implies doing the act purposely and deliberately, indicating a purpose to do it, without authority—careless whether [the contemnor] has the right or not—in violation of law’” Willfulness “involves more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law.” Evidence which does not show a person to be guilty of “purposeful and deliberate acts” or guilty of “knowledge and stubborn resistance” is insufficient to support a finding of willfulness.

122 N.C. App. 518, 523, 471 S.E.2d 415, 418 (1996) (alteration in original) (citations omitted).

In the instant case, the evidence tends to show that plaintiff was at all pertinent times able to pay his daughter’s college expenses, but refused to do so when she returned to college for her junior year during the 1994-95 academic year. Plaintiff contends that because of his daughter’s financial and personal problems, he, defendant, and their daughter had agreed that she would not return to college until the 1995-96 academic year. Defendant contends, however, that she cannot recall making such an agreement. In addition and in variance with the 31 January 1990 consent order, plaintiff adamantly stated that he

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refused to pay more than the cost his daughter would have incurred as an in-state student. As another condition, plaintiff agreed to pay for his daughter's spring college expenses if defendant and their daughter agreed to attend counseling with him to improve their relationships. Notably, none of these conditions were provided for in the 31 January 1990 consent order.

It is uncontroverted that plaintiff had the ability to pay his daughter's college expenses for the academic year 1994-95; that he "deliberately" and "stubbornly" refused to pay those expenses; and that he sought to alter his obligation under the 31 January 1990 consent order without court approval. In fact, plaintiff admits to such in his deposition and brief to this Court. Moreover, plaintiff, as a licensed attorney, enjoys full knowledge of the proper manner in which to modify a court order, but chose for various reasons not to do so.

We cannot sanction this unilateral attempt by plaintiff to amend his support obligation under the court order in question. As there is sufficient evidence to support the trial court's order and judgment finding plaintiff in contempt of court, plaintiff's argument fails.

In light of our conclusions as to plaintiff's two previous assignments of error, we need not address plaintiff's remaining assignments of error at this juncture. Further, as the provisions of the 31 January 1990 consent order were valid and enforceable; and plaintiff willfully violated said order, the decision of the trial court, denying plaintiff's motion to dismiss, is affirmed.

Affirmed.

Judge WYNN concurs.

Judge GREENE concurs in the result with a separate opinion.

Judge GREENE concurring.

I agree with the majority, for the reasons herein given, that the trial court did not err in denying the plaintiff's motion to dismiss the contempt motion. Otherwise I fully concur with the majority.

The law is well established that the parties to an action cannot "by consent, give a court jurisdiction over the subject matter of which it would not otherwise have jurisdiction." *DeGree v. DeGree*, 72 N.C. App. 668, 670, 325 S.E.2d 36, 37, *cert. denied*, 313 N.C. 598, 330 S.E.2d

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607 (1985). The trial court does not have jurisdiction, with some exceptions not here relevant, to enter an order directing the plaintiff to pay child support beyond the eighteenth birthday of a child. N.C.G.S. § 50-13.4(c) (1995). It would appear to follow, therefore, that the parties cannot confer jurisdiction upon the trial court to enter a consent decree extending child support obligations beyond the eighteenth birthday of a child and that any violation of that portion of the order would not be enforceable by contempt. *See Harding v. Harding*, 46 N.C. App. 62, 64, 264 S.E.2d 131, 132 (1980) (“[I]t is not contempt to disobey an order entered by a court without jurisdiction.” (citing 17 Am. Jur. 2d *Contempt* § 42)). Nonetheless, our Supreme Court has held that such an order is enforceable by contempt “notwithstanding that . . . [it] could not have been lawfully entered without [the parties’] consent.” *White v. White*, 289 N.C. 592, 596, 223 S.E.2d 377, 380 (1976). The public policy supporting the *White* holding is stated in the earlier opinion from this Court:

It is entirely possible, perhaps probable, that a wife may be willing to give up, by way of agreement with her husband, much to which she would be entitled in consideration of the husband doing more than he might be required to do for their children. To disregard such agreements when incorporated in a divorce decree, at least so far as the power of the court to enforce them is concerned, would discourage the settlement of differences between husband and wife or reduce such agreements, when made, to cloaks to be put on or shed at will.

White v. White, 25 N.C. App. 150, 156, 212 S.E.2d 511, 515 (quoting *Robrock v. Robrock*, 150 N.E.2d 421, 427-428 (Ohio 1958)), *aff’d*, 289 N.C. 592, 595, 223 S.E.2d 377, 379 (1975) (“We approve not only the decision of the Court of Appeals but also the careful research and reasoning upon which it is based.”).

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PAUL D. WILLIAMS, INDIVIDUALLY, AND PAUL D. WILLIAMS, AS GUARDIAN AD LITEM OF KIMBERLY PAULA WILLIAMS, A MINOR, PLAINTIFFS V. KENNETH HINTON, ADMINISTRATOR OF ESTATE OF THE LATE IRMA CYNTHIA PERRYMAN, CORINE MAYO JONES, ADMINISTRATOR OF THE ESTATE OF THE LATE JAMES JUNIOR JONES, AND SMITH TRANSFERS, INC., DEFENDANTS

No. COA96-1422

(Filed 16 September 1997)

1. Pleadings § 63 (NCI4th)— attorney scheduling conflict— failure to notify—Rule 11 sanctions improper

It was improper for the trial court to impose Rule 11 sanctions on plaintiffs' attorney for his failure to timely notify the trial court and defense counsel of his scheduling conflict since his failure to notify did not involve the filing of a pleading, motion or other paper.

2. Pleadings § 63 (NCI4th)— calendar notices—service on defendants—Rule 11 sanctions improper

Plaintiffs' attorney's failure to serve calendar notices on defense counsel rather than on defendants did not violate the Code of Professional Responsibility or the Rules of Civil Procedure and did not support the imposition of Rule 11 sanctions on the attorney.

3. Pleadings § 63 (NCI4th)— noncompliance with subpoena duces tecum—Rule 11 sanctions inappropriate

Failure of plaintiff's attorney to comply with a subpoena *duces tecum* served on plaintiff's wife was beyond the scope of Rule 11 sanctions since defendants' remedy, if any, for this conduct would have been a motion to compel under N.C.G.S. § 1A-1, Rule 26.

4. Pleadings § 63 (NCI4th)— voluntary dismissal—claim not frivolous—Rule 11 sanctions inappropriate

The taking of a voluntary dismissal of plaintiffs' claim on the first date set for trial did not warrant Rule 11 sanctions against plaintiffs' attorney where the attorney filed the voluntary dismissal before resting his case, and plaintiffs' claim was apparently not frivolously filed.

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5. Pleadings § 63 (NCI4th)— failure to timely serve UM carrier—noncompliance with pre-trial order request—Rule 11 sanctions inappropriate

The trial court erred by imposing Rule 11 sanctions against plaintiffs' attorney for failure to timely serve the summons and complaint on the uninsured motorist carrier and failure to comply with a request for a proposed pre-trial order since the attorney's conduct did not involve the filing of a pleading, motion or other paper.

Appeal by plaintiffs' attorney from order assessing Rule 11 sanctions against counsel entered 2 August 1996 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 20 August 1997.

Brenton D. Adams, pro se.

Ragsdale, Liggett & Foley, by David K. Liggett, for defendant appellees.

SMITH, Judge.

This case arises as a result of an automobile accident occurring on 11 May 1993 between plaintiff Paul Williams and defendants' decedents, Irma Cynthia Perryman and James Junior Jones. The case was originally filed on 6 October 1994. Plaintiffs took a voluntary dismissal without prejudice on 14 August 1995. The instant action was refiled on 8 November 1995.

Thereafter, plaintiffs' attorney (hereinafter "appellant") filed a calendar notice in Harnett County Superior Court on 15 February 1996 requesting a jury trial for the term beginning 25 March 1996. Appellant served the calendar notice directly on the named defendants. Defense counsel asked appellant to send future correspondence to defense counsel. On 25 March 1996 appellant filed a calendar request for a jury trial the week of 6 May 1996. Although defense counsel had requested appellant to send correspondence to defendants' counsel, this notice was again served directly on defendants. The case was eventually set for trial on 6 May 1996.

In the meantime, on 8 April 1996 appellant filed a motion for substitution of counsel for a different case in Guilford County Superior Court. The motion was granted on 16 April 1996 allowing appellant to

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appear as counsel. That case was scheduled for trial on 6 May 1996, the same day as the instant case. Appellant did not notify the Harnett County Superior Court or defense counsel of this conflict until 26 April 1996. Based on the conflict in dates, appellant filed a motion to continue the present case. On 23 May 1996, Judge Bowen entered Summary Judgment for defendants Corine Mayo Jones and Smith Transfers, Inc.

Subsequently, on 7 June 1996 defense counsel filed a motion for Rule 11 sanctions against appellant. In support of the motion, defendants claimed appellant: (1) failed to timely notify the trial court and defense counsel of his scheduling conflict on 6 May 1996; (2) failed to notify defense counsel of calendar notices, but instead served defendants directly despite defense counsel's requests; (3) failed to comply with a 16 April 1996 *subpoena duces tecum* on plaintiff's wife to secure tax records of plaintiff; (4) calendared this action for trial beginning 6 May 1996 without being prepared, and additionally for substituting himself as counsel in another case rendering defense counsel's trial preparation unnecessary; and (5) other objectively unreasonable conduct under the circumstances throughout the duration of the litigation. This motion for sanctions was granted 2 August 1996. The trial court entered an order instructing appellant to pay \$2,405.25. Appellant appeals from this decision.

This Court reviews the propriety of imposing sanctions *de novo*. *Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). *De novo* review by an appellate court involves a determination of: (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. *Id.* If these elements are met, the trial court's decision to impose or deny sanctions is upheld. *Id.* The totality of the circumstances determine whether Rule 11 sanctions are merited. *Carter v. Stanly County*, 125 N.C. App. 628, 636, 482 S.E.2d 9, 13-14 (citing *Mack v. Moore*, 107 N.C. App. 87, 94, 418 S.E.2d 685, 689 (1992)), *disc. review denied*, 346 N.C. 276, 487 S.E.2d 540 (1997).

There are three separate and distinct issues to Rule 11 including: (1) legal sufficiency; (2) factual sufficiency; and (3) improper purpose. *Bryson v. Sullivan*, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992). A violation of any one of these three is sufficient to support sanctions under Rule 11.

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[1] In support of Rule 11 sanctions, defendants claim appellant failed to timely notify the trial court and defense counsel of his scheduling conflict on 6 May 1996. According to a prior decision of this Court, Rule 11 applies only to signed pleadings, motions or other papers. *Ward v. Lyall*, 125 N.C. App. 732, 735, 482 S.E.2d 740, 742, *disc. review denied and appeal dismissed*, 346 N.C. 290, 487 S.E.2d 573 (1997). This Court has pointed out that “‘Rule 11 is not a panacea intended to remedy all manner[] of attorney misconduct. . . .’” *Id.* (quoting *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986), *abrogated on other grounds*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 L. Ed. 2d 359 (1990)). We note, however, that the trial judge and counsel did not have the benefit of *Ward v. Lyall*, as *Ward* was filed approximately ten months after the trial court’s order in the instant case. We hold it was improper for the trial court to impose Rule 11 sanctions on appellant in the case *sub judice* based on appellant’s conduct in failing to notify, since it does not involve the filing of a pleading, motion, or other paper. Thus, failure to timely notify is beyond the scope of Rule 11.

[2] Second, defense counsel argues that appellant failed to notify defense counsel of calendar notices. Instead, appellant repeatedly served defendants directly, despite defense counsel’s requests to the contrary. This service did not violate North Carolina Rule of Professional Conduct Canon VII, Rule 7.4, since the service did not involve communication as contemplated in this rule. In addition, the Rules of Civil Procedure expressly allow service “upon either the party, or, unless service upon the party himself is ordered by the court, upon his attorney of record.” N.C. Gen. Stat. § 1A-1, Rule 5(b) (1996 Cum. Supp.). However, “[t]he conduct of the lawyers before the court and with other lawyers should be characterized by candor and fairness.” General Rules of Practice for the Superior and District Courts, Rule 12 (1997). Although appellant should have honored defense counsel’s request concerning future notices with more respect as contemplated in Rule 12, he did not violate the Code of Professional Responsibility or the Rules of Civil Procedure.

Furthermore, finding of fact #9 states defendants’ counsel received a copy of the notice only after requesting it from appellant’s office. However, a letter included in the record dated 20 March 1996 states defense counsel received a copy of the calendar request from her client. Therefore, defense counsel had ample notice of the calendar request and sanctions should not be based on this finding of fact.

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[3] Third, defendants argue appellant failed to comply with the 16 April 1996 *subpoena duces tecum* on plaintiff Paul Williams' wife to secure tax records of Williams. Again, this argument involves only conduct. Therefore, this conduct is beyond the scope of Rule 11 as well. Defendants' remedy, if any, for this conduct would be a motion to compel under N.C. Gen. Stat. § 1A-1, Rule 26 (1990).

Defendants also argue that appellant calendared this action for trial beginning 6 May 1996 without being prepared, rendering defense counsel's trial preparation unnecessary. At the time appellant signed the calendar request on 21 March 1996, he was not involved in the case in Guilford County on 6 May 1996. Therefore, appellant could have been ready for trial at the time he signed the Calendar Request form.

[4] Finally, defense counsel argues sanctions should be imposed based on other objectively unreasonable conduct under the circumstances throughout the duration of the litigation. One of these alleged circumstances involves appellant taking a voluntary dismissal on 14 August 1995, the first date set for trial. A plaintiff may voluntarily dismiss his suit, without order of the court, by filing a notice of dismissal at any time before resting his case. *Carter v. Clowers*, 102 N.C. App. 247, 251, 401 S.E.2d 662, 664 (1991); *see also* N.C. Gen. Stat. § 1A-1, Rule 41 (1990). This rule provides dismissal is without prejudice, unless otherwise stated, allowing plaintiff to commence a new action based on the same claim within one year. *Id.* In this case, appellant apparently did not file a frivolous lawsuit requiring him to dismiss the case. Appellant voluntarily dismissed on the date of trial after his realization on 9 August 1995 that he had included the wrong uninsured motorist carrier. Since appellant filed his claim for voluntary dismissal before resting his case and the claim was apparently not frivolously filed, he has not violated any rule. Therefore, Rule 11 sanctions are inappropriate for this conduct.

[5] In addition, defendants argue that even though appellant advised the uninsured motorist carrier Harleysville of the pending claim, appellant failed to timely serve Harleysville with a complaint and summons. Sanctions were imposed by the trial court partly for this failure to timely serve. It is "improper for the trial court to impose Rule 11 sanctions on [appellant] for his failure to promptly serve the summons and complaint, as it did not involve the filing of a pleading or other paper and was therefore beyond the scope of Rule 11." *Ward*, 125 N.C. App. at 735, 482 S.E.2d at 742.

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Defense counsel also claims appellant failed to comply with a request for a proposed pre-trial order. As noted previously, it is improper for the trial court to impose Rule 11 sanctions based on appellant's conduct, since it does not involve the filing of a pleading, motion, or other paper. Even though we hold appellant's conduct does not fall within the parameters of Rule 11, the trial courts have ample power to control the conduct of attorneys through either the inherent power to discipline attorneys or by the use of contempt powers, or both, after proper notice and opportunity to be heard. In addition, the courts also have the power to insure that counsel obtains no advantage over an adversary by use of the court's authority to schedule and continue cases.

For the foregoing reasons, the decision of the trial court is

Reversed.

Judges LEWIS and JOHN concur.

JUSTUS M. AMMONS AND JO ELLEN AMMONS, PLAINTIFFS v. COUNTY OF WAKE,
DEFENDANT

No. COA96-574

(Filed 16 September 1997)

1. Taxation § 104 (NCI4th)— meaning of clerical error

The term "clerical error" in N.C.G.S. § 105-381 refers only to a transcription error; furthermore, to qualify as a clerical error, the mistake must ordinarily be apparent on the face of the instrument and must be unintended.

2. Taxation § 104 (NCI4th)— tax assessor's inaccurate assertion—no clerical error—no entitlement to refund

A county tax assessor's inaccurate assertion that plaintiffs' property failed to qualify for "present use value" taxation as forestland was not a "clerical error" within the meaning of N.C.G.S. § 105-381, and plaintiffs were thus not entitled by that statute to a refund of the excess property tax paid as a result of the assessor's misrepresentation.

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[127 N.C. App. 426 (1997)]

Appeal by plaintiffs from judgment filed 1 March 1996 by Judge David Q. LaBarre in Wake County Superior Court. Heard in the Court of Appeals 30 January 1997.

James M. Kimzey for plaintiffs-appellants.

Wake County Attorney, by Assistant Wake County Attorney Shelley T. Eason, for defendant-appellee.

JOHN, Judge.

Plaintiffs appeal the trial court's Judgment and Order dismissing their petition pursuant to N.C.G.S. § 105-381 (1995) seeking a property tax refund. Plaintiffs contend the stipulated facts required the trial court to determine plaintiffs paid excess property tax as the result of clerical error. We disagree.

The instant action was instituted 22 August 1995. Following defendant's answer, the parties entered into the following pertinent stipulations 2 February 1996:

7. In December 1985, Ammons Construction Co, Inc., became the owner of three wooded tracts in Wake County, Tax ID ##0044088, 0179642 and 01416600 (hereinafter, "the property".) The property was conveyed to Ammons Land Co, Inc., in April 1989 and then to Justus Ammons and wife Jo Ellen Ammons on 20 June 1991. Both Ammons Construction Co, Inc., and Ammons Land Co, Inc. are North Carolina corporations whose majority shareholder and president is Justus Ammons. All stock is owned by family members of Justus Ammons.

8. During a conference with Mr. Curl in 1993 in which Mr. Ammons discussed the tax status of many tax parcels he owned, Mr. Ammons verbally asked Wake County Assessor Emmett Curl whether the subject property would qualify for "present use value" taxation as forest land under G.S. 105-277.2 to 105-277.7, and specifically under G.S. 105-277.3. Present use value gives a lower tax rate to qualifying agricultural and forest land. Mr. Curl advised him that present use value could not be granted because it would not meet the ownership requirements of 105-277.3(b), thereby discouraging Mr. Ammons from making a written application for present use value treatment which could be appealed to the County Board of Equalization and Review.

....

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10. In 1994, even though he received the same verbal advice from Mr. Curl, Mr. Ammons did apply for present use value treatment for the property and the Board of Equalization and Review did, in fact, grant present use value treatment for the property in 1994. 1994 was the only year in which Mr. Ammons filed a written application for present-use value for the property.

....

15. The ad valorem taxes in question are for 1991, 1992 and 1993, on Wake County real estate parcels ## 0044088, 0179642, and 0141600. The amount of the payments which were in excess of those that would have been paid had these parcels been taxed at use value is (1) in 1991, \$18,593.238 [sic]; (2) in 1992, \$27,135.04; and (3) in 1993, \$31,530.15, totaling \$77,258.57. Plaintiffs contend that this amount of taxes constitutes taxes "imposed through clerical error" under GS [sic] 105-381.

16. Under statutes interpreted in In Re Appeal of Davis, 113 NC [sic] App. 743, discretionary review denied, 336 N.C. 605 (1994), the property in question would have been entitled to the lower tax classification during 1991, 1992 and 1993

....

20. The issue before the court is whether or not these taxes were paid as a result of "clerical error".

21. If the taxes were imposed as a result of clerical error, the plaintiffs are entitled to a refund for taxes paid in excess of those that would have been paid under use value, plus interest in accordance with G.S. 105-381.

Following non-jury trial, the trial court filed its Judgment and Order on 1 March 1996, which included the following conclusion of law:

2. The taxes for which Plaintiffs seek refund were not imposed through [sic] "imposed through clerical error" as that phrase is used in G.S. §105-381(a) and Plaintiffs are not entitled to refund under that statute.

The court consequently dismissed plaintiffs' action, and the latter filed timely notice of appeal.

As stipulated by the parties, *see Gilbert v. Thomas*, 64 N.C. App. 582, 584, 307 S.E.2d 853, 855 (1983) (citation omitted) (this Court

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“must review the case as tried below, as reflected in the record on appeal,” and not “as the parties might have tried it”), the dispositive issue herein turns on the meaning of the phrase “clerical error” as utilized in G.S. § 105-381. Accordingly, if the interpretation of Wake County Tax Assessor Emmett Curl (Curl) that plaintiffs’ property did not qualify for “present use value” taxation was not a “clerical error” under the statute, the trial court did not err in dismissing the instant action.

Plaintiffs maintain the issue of whether the allegedly inaccurate advice given by Curl constituted clerical error “must be resolved against Wake County in case of any doubt” because

it is part of the law of North Carolina, . . . that in cases of doubt, taxing statutes are construed most strongly against the government and in favor of the taxpayer.

Davenport v. Ralph N. Peters & Co., 386 F.2d 199, 209 (4th Cir. 1967). While plaintiffs accurately cite the applicable law, we conclude their argument is unavailing due to lack of ambiguity in the statutory term.

[1] Clerical error has been defined as

[g]enerally, a mistake in writing or copying. . . . It may include error apparent on face of instrument, record, indictment or information.

Black’s Law Dictionary 252 (6th ed. 1990). This definition of clerical error as designating mistakes in transcription has been adopted by other jurisdictions. *See generally*, 7A Words and Phrases, Clerical Errors p. 5 (1952 ed.); *see also In the Matter of Appeal of Butler*, 84 N.C. App. 213, 220, 352 S.E.2d 232, 236, *disc. review denied*, 319 N.C. 673, 356 S.E.2d 775 (1987) (clerical error in coding property values from “land pricing map” into computer resulting in undervaluation of taxpayers’ property allowed county to reappraise property under G.S. § 105-287). Plaintiffs’ assertion notwithstanding, we therefore hold the meaning of clerical error in G.S. § 105-381 is not ambiguous, and applies only to transcription errors.

[2] Further, to qualify as a clerical error, the mistake must ordinarily be apparent on the face of the instrument. As the Alabama Supreme Court stated in *Trott v. Birmingham Ry., Light & Power Co.*, 39 So. 716 (Ala. 1905),

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[a] clerical error is one made by a clerk in transcribing, or otherwise, and, of course, must be apparent on the face of the record, and capable of being corrected by reference to the record only.

Id. at 717. In the case *sub judice*, assuming *arguendo* Curl's statement proffered "[d]uring a conference . . . in 1993" amounted to an erroneous assertion as to the qualification of plaintiffs' property for "present use valuation" taxation, the error is not apparent on the face of the statement, but only by reference to a decision of this Court handed down approximately one year later. *See In re Appeal of Davis*, 113 N.C. App. 743, 749, 440 S.E.2d 307, 311 (filed 1 March 1994), *disc. review denied*, 336 N.C. 605, 448 S.E.2d 118 (1994) (relevant time under N.C.G.S. § 105-277.3(c) for determining property's eligibility for "present use valuation" is after property has been transferred to new owner).

In addition, a clerical error must be unintended. *See Chapman v. Town of Ellington*, 635 A.2d 830, 835 (Conn. App. 1993) (where tax assessor intended result that occurred, the assessment, even in error, was not clerical error, but an error of judgment or law). In the case *sub judice*, it is not disputed that Curl intended that plaintiffs would accept his interpretation that their property did not qualify for "present use value" taxation. Thus, even though his statement may have been in error, it was an error of judgment or law, not a clerical mistake. *See also Redevelopment Comm. v. Guilford County*, 274 N.C. 585, 589, 164 S.E.2d 476 479 (1968) (noting North Carolina statutes and case law recognize a distinction between an erroneous tax and an illegal or invalid tax for purpose of issuing injunction to prevent collection of an illegal tax). Mistake of judgment or law is not an enumerated defense to collection of property taxes under G.S. § 105-381(a)(1). *See Kinro, Inc. v. Randolph County*, 108 N.C. App. 334, 337-38, 423 S.E.2d 513, 515 (1992) (refund claim based upon "over assessed values of personal property assets" not one of three valid defenses to collection of taxes under statute).

In sum, plaintiffs have stipulated that the sole basis upon which they brought suit claiming entitlement to refund of property taxes was clerical error under G.S. § 105-381 in the form of Curl's allegedly inaccurate assertion that plaintiffs' property failed to qualify for "present use value" taxation. As Curl's statement did not constitute "clerical error," the trial court properly dismissed plaintiffs' action.

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Affirmed.

Judges McGEE and SMITH concur.

STATE OF NORTH CAROLINA v. ROBERT SAMUEL THOMAS, DEFENDANT

No. COA97-171

(Filed 16 September 1997)

**Automobiles and Other Vehicles § 834 (NCI4th)— DWI
arrest—probable cause**

In a prosecution for habitual impaired driving and driving while license revoked, the trial court did not err in concluding that there was probable cause to arrest defendant where the arresting officer was notified of defendant's intoxication by an off-duty policeman and the arresting officer observed defendant's disorderly appearance, red glassy eyes, strong odor of alcohol, backing up when he saw the arresting officer, and inability to produce a driver's license.

Appeal by defendant from judgment entered 2 August 1996 by Judge James C. Spencer, Jr. in Alamance County Superior Court. Heard in the Court of Appeals 11 August 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Jonathan P. Babb, for the State.

Hemric, Lambeth & Champion, P.A., by Ricky W. Champion, for defendant-appellant.

WYNN, Judge.

A grand jury indicted defendant on one count of habitual impaired driving and one count of driving while license revoked. On 31 July 1996, a jury convicted defendant of driving while impaired. Thereafter, the trial court sentenced defendant, who had a prior record level of IV, to a minimum term of eighteen months imprisonment and a maximum term of twenty-two months imprisonment.

At trial, the State's evidence tended to show that on 14 May 1995, Charles Ward while in an off-duty status as a police officer with the

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Burlington City Police Department, worked as a security officer at the Alamance County Hospital. That evening, an emergency room nurse told him that a patient on medication which would impair her ability to operate a motor vehicle was leaving the hospital. She identified the patient for Officer Ward. Officer Ward left the hospital and found the woman in the parking area as she opened the driver's side door to a small, blue hatch back vehicle. When she sat down in the car, Officer Ward noticed defendant who was "slumbered down in the [passenger] seat" with his eyes closed. After the woman acknowledged that she was on medication which would impair her ability to drive, defendant woke up and started speaking to her. Officer Ward detected a strong odor of alcohol coming from his breath, and noticed that defendant's eyes were very red and bloodshot. In addition, his physical appearance was disorderly. Officer Ward believed defendant's mental and/or physical faculties were impaired by the consumption of alcohol.

Officer Ward told the woman she should not drive, and that defendant "definitely [didn't] need to drive." The woman told him that they were going to call someone to pick them up, so Officer Ward returned to the hospital. As he did, he radioed Officer John Bigelow and told him that "there was a small blue hatch back vehicle in the parking lot and . . . the occupants ha[ve] been instructed not to drive." Within minutes, Officer Ward returned to the parking area and saw the car backing up and leaving the parking space. He could not see who was driving the vehicle, and immediately radioed Officer Bigelow. Officer Bigelow, who had been parked across the street, pulled over to the parking area. When defendant saw him, he started backing the car up, but did not back up in a straight line or follow the curve of the driveway. In fact, had he continued, he would have backed into the curb.

Officer Bigelow activated his blue lights and defendant stopped the car. When Officer Bigelow asked defendant for his license and registration, defendant asked him why he stopped him. Officer Bigelow, who noticed a strong odor of alcohol about defendant, explained that defendant had been advised not to drive, and asked defendant to step out of the car. Defendant could not produce a driver's license or registration. Moreover, when defendant stepped out of the car, Officer Bigelow noticed that his eyes were red and glassy, and that his appearance was disorderly.

Based on his observations of defendant, the fact that defendant backed up upon seeing him, and defendant's inability to produce

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either a driver's license or registration, Officer Bigelow arrested him. Officer Bigelow believed that both defendant's mental and physical faculties were impaired. After his arrest, defendant was unable to perform the "walk and turn" test, and did not perform well when asked to touch his nose. Moreover, defendant, whose speech was mumbled and slurred, blew a .23 on the Intoxilyzer 5000 less than an hour after his arrest.

On appeal, defendant contends only that the trial court erred by denying his motion to suppress. Specifically, he argues that Officer Bigelow did not have sufficient evidence to establish probable cause for his warrantless arrest. In making this argument, defendant does not challenge the trial court's findings of fact as lacking support in the record. Instead, he appears to argue that the trial court erred by concluding that the evidence establishes probable cause. We disagree.

Probable cause for an arrest is " 'a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.' " *State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971) (quoting 5 Am. Jur. 2d *Arrests* § 44 (1962)). To justify a warrantless arrest, it is not necessary to show that the offense was actually committed, only that the officer had a reasonable ground to believe it was committed. *State v. Crawford*, 125 N.C. App. 279, 282, 480 S.E.2d 422, 424 (1997). Whether these grounds exist is determined by the practical and factual considerations of everyday life on which reasonable and prudent people act. *Id.*

The evidence in this case is clearly sufficient to establish probable cause for defendant's warrantless arrest. While, as defendant argues, many of the factors identified by Officer Bigelow would, if viewed singly, be insufficient to establish probable cause, they are clearly sufficient when considered as a whole. For example, Officer Bigelow testified that when he received Officer Ward's call that the occupants of a small blue hatch back vehicle had been instructed not to drive, he understood this to mean that Officer Ward believed they were impaired. It is well settled that "information given by one officer to another is reasonably reliable information to provide probable cause." *State v. Matthews*, 40 N.C. App. 41, 44, 251 S.E.2d 897, 900 (1979); *see also State v. Hart*, 64 N.C. App. 699, 702, 308 S.E.2d 474, 476 (1983).

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[127 N.C. App. 434 (1997)]

In addition to the information received from Officer Ward, Officer Bigelow's own observations of defendant, set forth fully above, provide sufficient evidence of probable cause to justify defendant's warrantless arrest. Based on his observations of defendant—including his disorderly appearance, red glassy eyes, the strong odor of alcohol, backing up when he saw Officer Bigelow, and inability to produce either a driver's license or registration—Officer Bigelow arrested defendant. Taken as a whole, this evidence is clearly sufficient to establish probable cause, and the trial court properly denied defendant's motion to suppress. *See, e.g., State v. Adkerson*, 90 N.C. App. 333, 368 S.E.2d 434 (1988) (finding probable cause where trooper arrested defendant for driving while impaired based on his driving, appearance and behavior); *State v. Rogers*, 124 N.C. App. 364, 477 S.E.2d 221 (1996) (finding probable cause where trooper had opportunity to observe defendant, spoke with defendant and smelled a strong odor of alcohol on him, and defendant had a blood alcohol concentration of .13), *disc. review denied*, 345 N.C. 352, 483 S.E.2d 187 (1997).

Finally, although we believe Officer Bigelow had sufficient evidence of probable cause to arrest defendant for driving while impaired, we note that defendant's inability to produce his driver's license gave Officer Bigelow an additional basis on which to arrest him. *See State v. Johnston*, 115 N.C. App. 711, 714-15, 446 S.E.2d 135, 138 (1994).

No error.

Judges JOHN and SMITH concur.

FRED JACKSON D/B/A COMPLETE CLEANING COMPANY, PETITIONER V.
DEPARTMENT OF ADMINISTRATION, RESPONDENT

No. COA97-232

(Filed 16 September 1997)

Administrative Law and Other Procedure § 57 (NCI4th)—judicial review—final agency decision—not required

In an action challenging the failure of the Department of Administration to award petitioner a contract for janitorial services, the trial court erred by dismissing petitioner's petition for

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judicial review for failure to exhaust his administrative remedies where petitioner did not file any written exceptions or arguments to the agency's final decision. While N.C.G.S. § 150B-36(a) provides the parties with an opportunity to file written exceptions and/or written arguments, it does not create an additional exhaustion hurdle and in no way obligated petitioner to file specific exceptions to the recommended decision before issuance of a final agency decision.

Appeal by petitioner from order entered 9 September 1996 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 August 1997.

Dillard Law Offices, by Jesse R. Dillard, Jr., for petitioner-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General Teresa L. White, for respondent-appellee.

WYNN, Judge.

On 17 July 1995, petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings alleging that respondent "refused to award [him] a contract for janitorial services although [he] was the lowest responsive bidder to the request for proposal." On 4 January 1996, Administrative Law Judge Beecher R. Gray entered a recommended decision in which he recommended affirming respondent's decision.

On 4 March 1996, petitioner received a notice of pending final agency decision which informed him that each party had the right to file exceptions to the recommended decision, as well as written arguments. Although petitioner requested, and received, a fifteen-day extension of time in which to file any exceptions and written arguments, petitioner did not do so. On 30 May 1996, the agency entered a final agency decision adverse to petitioner.

By petition for judicial review dated 3 July 1996 and filed in Mecklenburg County Superior Court, petitioner sought judicial review of the final agency decision. Respondent moved to dismiss the petition on the ground that petitioner failed to exhaust his administrative remedies. On 9 September 1996, the Honorable Marvin K. Gray dismissed the petition for lack of jurisdiction based on petitioner's failure to exhaust administrative remedies. Although the basis for

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Judge Gray's decision does not appear in the record before this Court, the parties agree that his decision was based on petitioner's failure to file written exceptions and/or written arguments prior to issuance of the final agency decision.

The sole issue presented by this appeal is whether the trial court erred by dismissing the petition for lack of jurisdiction. Specifically, petitioner contends that his failure to file written exceptions and/or written arguments has no bearing on the superior court's jurisdiction, and that "[f]iling exceptions and/or arguments is an optional portion of the contested case remedy." We agree.

A party's right to judicial review is governed by N.C. Gen. Stat. § 150B-43 (1995) which provides, among other things, that a party seeking judicial review must exhaust all available administrative remedies before doing so. N.C. Gen. Stat. § 150B-43 (1995). The doctrine of exhaustion of administrative remedies is designed to avoid the "interruption and cessation of proceedings before a commission by untimely and premature intervention by the courts [which] would completely destroy the efficiency, effectiveness, and purpose of the administrative agencies." *Church v. Board of Education*, 31 N.C. App. 641, 646-47, 230 S.E.2d 769, 772 (1976) (quoting *Elmore v. Lanier, Comr. of Insurance*, 270 N.C. 674, 678, 155 S.E.2d 114, 116 (1967)), *appeal dismissed and disc. review denied*, 292 N.C. 264, 233 S.E.2d 391 (1977). Therefore, as a general rule a party must exhaust all applicable administrative remedies before filing in the superior court. *Id.*; see also *N.C. Central University v. Taylor*, 122 N.C. App. 609, 471 S.E.2d 115 (1996), *aff'd per curiam*, 345 N.C. 630, 481 S.E.2d 83 (1997).

Here, respondent does not contend that petitioner omitted any of the necessary levels of administrative review. Instead, respondent simply argues that petitioner's failure to file written exceptions and/or arguments pending final agency review constituted a failure to exhaust administrative remedies. This position is not supported by either our case law or the relevant statutory provision.

N.C. Gen. Stat. § 150B-36(a) (1995) provides that "[b]efore the agency makes a final decision, it shall give each party an *opportunity* to file exceptions to the decision recommended by the administrative law judge, and to present written arguments to those in the agency who will make the final decision or order." N.C. Gen. Stat. § 150B-36(a) (1995) (emphasis added). Although the statute places an affirmative duty on the *agency* to provide this opportunity to the par-

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ties, the plain language of the statute “in no way obligates petitioners to file specific exceptions to the recommended decision before issuance of the final agency decision.” *Owen v. UNC-G Physical Plant*, 121 N.C. App. 682, 685, 468 S.E.2d 813, 816, *disc. review improvidently allowed*, 344 N.C. 731, 477 S.E.2d 33 (1996). “To hold otherwise would require this Court to read language into the statute where none presently exists.” *Id.*

As *Owen* makes clear, N.C. Gen. Stat. § 150B-36(a) (1995) simply provides the parties with an *opportunity* to file written exceptions and/or written arguments. By its plain language, it does not create an additional exhaustion hurdle. Therefore, we hold that the trial court erred in dismissing the petition for failure to exhaust administrative remedies.

Reversed and remanded for further proceedings.

Judges JOHN and SMITH concur.

STATE OF NORTH CAROLINA v. ANTHONY JAMES LOVE

No. COA96-1540

(Filed 16 September 1997)

1. Criminal Law § 819 (NCI4th Rev.)— lesser included offenses—failure to instruct—error cured by acquittal

Defendant’s acquittal of second-degree sexual offense rendered harmless any error in the trial court’s failure to instruct the jury on the lesser included offenses of assault on a female and simple assault.

2. Crime Against Nature § 4 (NCI4th)— indecent liberties with child—assault on female not lesser offense

Assault on a female is not a lesser included offense of taking indecent liberties with a child because assault on a female contains elements not present in the offense of taking indecent liberties; therefore, the trial court did not err by refusing to instruct on assault on a female as a lesser included offense in a prosecution for taking indecent liberties with a child.

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Appeal by defendant from judgment entered 19 April 1996 by Judge Richard B. Allsbrook in Halifax County Superior Court. Heard in the Court of Appeals 11 August 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Elizabeth L. Oxley, for the State.

Michael Lee Frazier for defendant-appellant.

WYNN, Judge.

Following grand jury indictments on taking indecent liberties with a child and second degree sexual offense, a jury convicted the defendant of only the indecent liberty charge. Thereafter, Judge Richard B. Allsbrook sentenced him to five years imprisonment. Although in this appeal, defendant identifies several assignments of error, he argues only that the trial court erred by denying his request to instruct on the assault on a female and simple assault, both of which he contends are lesser included offenses of second degree sexual offense and taking indecent liberties with a child.¹ We disagree.

[1] At the outset, we note that defendant's acquittal of second degree sexual offense, the greater offense, is tantamount to an acquittal of all possible lesser included offenses. *State v. Beach*, 283 N.C. 261, 270, 196 S.E.2d 214, 220 (1973), *overruled in part on other grounds by State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984). Therefore, "the jury verdict rendered nonprejudicial the failure of the trial judge to submit . . . lesser included offense[s]." *Id.*; see also *State v. Berkley*, 56 N.C. App. 163, 287 S.E.2d 445 (1982) (noting that acquittal rendered any error regarding offense harmless). Accordingly, we address defendant's argument only as it pertains to the taking indecent liberties with a child conviction.

It is well established that "the *definitions* accorded the crimes determine whether one offense is a lesser included offense of another crime." *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 378 (1982), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). Moreover, "all of the essential elements of the lesser crime must also be essential elements included in the greater crime." *Id.* at 635, 295 S.E.2d at 379.

[2] Here, defendant cites no authority for the proposition that assault on a female is a lesser included offense of taking indecent lib-

1. We omit a detailed recitation of the facts of this case because such facts are not necessary to resolve the legal issues presented in this appeal.

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erties with a child. Indeed, applicable case law and a review of both offenses show that assault on a female is not a lesser included offense of taking indecent liberties with a child.

In *State v. Holman*, 94 N.C. App. 361, 380 S.E.2d 128 (1989), this Court specifically rejected a defendant's argument that assault on a female under twelve was a lesser included offense of taking indecent liberties with a child. In doing so, we stated:

Clearly, assault is not an essential element of taking indecent liberties with a child. Since assault is an essential element of the crime of assault on a child under the age of 12 years, this offense cannot be a lesser included offense of taking indecent liberties with a child.

Id. at 364, 380 S.E.2d at 130. Although *Holman* dealt with assault on a female under twelve, its reasoning applies with equal force to assault on a female. Plainly, if the assault in *Holman* was not an essential element of taking indecent liberties with a child, the assault in this case is no more so. *See Weaver*, 306 N.C. at 635, 295 S.E.2d at 378 (rejecting the proposition that the facts of a particular case determine whether one crime is a lesser included offense of another).

Furthermore, we note that the age requirements contained in each offense prevents recognition of assault on a female as a lesser included offense. For example, an indecent liberties conviction requires that the victim be under sixteen years old, and that the offender be at least sixteen years old and at least five years older than the victim. N.C. Gen. Stat. § 14-202.1 (1993). In comparison, assault on a female requires that the offender be at least eighteen years old. N.C. Gen. Stat. § 14-33(b)(2) (1993). It follows that assault on a female is not a lesser included offense of taking indecent liberties with a child because assault on a female contains elements not present in the greater offense. *See Weaver*, 306 N.C. at 636, 295 S.E.2d at 379 (holding that taking indecent liberties with a child is not a lesser included offense of statutory rape given the differing age elements).

Based on the foregoing, we hold that the trial court properly refused to instruct on assault on a female as a lesser included offense of taking indecent liberties with a child. In sum, we find that the defendant received a fair trial, free from prejudicial error.

No error.

Judges JOHN and SMITH concur.

IN THE COURT OF APPEALS
INTEGON GENERAL INS. CO. v. MARTIN

[127 N.C. App. 440 (1997)]

INTEGON GENERAL INSURANCE COMPANY, PLAINTIFF-APPELLANT v. DOUGLAS
GLENN MARTIN AND GLENN PAUL MARTIN, DEFENDANTS-APPELLEES

COA96-1070

(Filed 16 September 1997)

**Process and Service § 61 (NCI4th)— four summonses—alias or
pluries box not checked—no reference to original sum-
mons—complaint attached**

The trial court did not err by dismissing a case for insufficiency of process where four summonses were issued by the clerk of court; each summons had a copy of the complaint attached to it, but no reference was made to the original summons on the second, third, or fourth summons; and the box on the summons form for “alias or pluries” was not checked on any of the summonses. N.C.G.S. § 1A-1, Rule 4(d).

Appeal by Integon General Insurance Company from a judgment entered 12 June 1996 by Judge Marilyn R. Bissell in Mecklenburg County District Court. Heard in the Court of Appeals 12 May 1997.

Ackerman Law Firm, P.A., by C. O. Ackerman, Jr. for plaintiff-appellant.

Moseley, Elliott & Sholar, L.L.P., by Bradley A. Elliot for defendants-appellees.

McGEE, Judge.

Integon General Insurance Company (Integon) filed a complaint against Douglas Glenn Martin and Glenn Paul Martin with the Clerk of Superior Court for Mecklenburg County (Clerk) on 28 April 1995. Integon presented to the Clerk a civil summons which was then issued. Integon did not serve this summons, but within ninety days of the issuance of the first summons, Integon presented a second summons to the Clerk. This summons was also not served. Within ninety days of the issuance of this second summons, Integon presented a third summons to the Clerk, which was duly issued on 7 September 1995. The third summons was also never served. On 4 October 1995, a fourth summons was presented by Integon to the Clerk and was duly issued. The fourth summons, along with copies of the complaint attached to it, was served upon the defendant by the Sheriff of Northhampton County, North Carolina on 12 October 1995. No refer-

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ence was made in the second, third, and fourth summons to the original summons and the box on the summons form designated for "alias or pluries" was not checked on any of the summonses.

The issue on appeal is whether the trial court properly dismissed the complaint for insufficiency of process. Rule 4(d) of the North Carolina Rules of Civil Procedure provides two methods by which to extend time for service upon a defendant in a civil action. The plaintiff argues that he successfully served the defendant by the second method using an alias or pluries summons within the ninety days prescribed by the Rule. We disagree. "The summons . . . constitutes the exercise of the power of the State to bring the defendant before the court"; thus, "defects in the summons receive careful scrutiny." *Childress v. Forsyth County Hosp. Auth.*, 70 N.C. App. 281, 285, 319 S.E.2d 329, 332 (1984), *cert. denied*, 312 N.C. 796, 325 S.E.2d 484 (1985). "If a statute specifies that certain requirements must be complied with in the process of serving [a] summons, failure to follow these requirements results in a failure of service." *Lynch v. Lynch*, 302 N.C. 189, 196, 274 S.E.2d 212, 218 (1981).

To determine the requirements of service by an alias or pluries summons, we first examine the statutory language of N.C. Gen. Stat. § 1A-1, Rule 4(d) (Cum. Supp. 1996) which states:

[t]he plaintiff may sue out an alias or pluries summons returnable in the same manner as the original process. Such alias or pluries summons may be sued out at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.

Case law has interpreted the statute's reference to "the chain of summonses" as an implicit requirement that an alias or pluries summons contain a reference in its body "to indicate its alleged relation to the original." *Mintz v. Frink*, 217 N.C. 101, 104, 6 S.E.2d 804, 806 (1940). The issuance of an alias or pluries summons without this reference has the double effect of initiating a new action and discontinuing the original one. *Id.* at 104, 6 S.E.2d at 807. Reference to another legal document such as a complaint "does not constitute a link in the chain of process" because the complaint is not an official court document vested with the court's authority to confer jurisdiction. *Childress*, 70 N.C. App. at 284-85, 319 S.E.2d at 331-32.

In this case, none of the succeeding summonses on their face refer to the original summons. The only indication that the succeed-

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ing summonses relate to the original summons is that a copy of the complaint was attached to each of the summonses. The complaint, however, confers no jurisdiction, and thus does not cure the defective summons. *Childress*, 70 N.C. App. at 284-85, 319 S.E.2d at 332.

It is within the discretion of the trial court to extend plaintiff's time to amend a defective summons. The trial court exercised its discretion by refusing to extend plaintiff's time to amend the defective summons under N.C. Gen. Stat. § 1A-1 Rule 6(b). The plaintiff failed to show the trial court abused its discretion. We therefore hold that the trial court did not err in dismissing the case for insufficiency of process.

Affirmed.

Judges EAGLES and SMITH concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF v.
GERALD WAYNE BRILEY, JOAN S. BRILEY, JOE QUINERLY, LINDA QUINERLY,
WALLACE E. BEDDARD, SR., AND DONNA H. BEDDARD, DEFENDANTS

No. COA95-1427

(Filed 7 October 1997)

1. Insurance § 725 (NCI4th)— homeowner's liability insurance—meaning of "business"

The term "business" as used in the liability portion of a homeowner's policy refers to an individual's paramount means of earning a livelihood.

2. Insurance § 725 (NCI4th)— homeowner's liability insurance—injury to another during part-time work—business use exclusion inapplicable

The business use exclusion in the liability portion of a homeowner's policy did not apply to exclude coverage for injuries received by a person assisting the insured in his part-time tree trimming work when he was struck by a tree limb cut by the insured where the insured's primary employment was as a spinning operator at DuPont.

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[127 N.C. App. 442 (1997)]

Appeal by plaintiff from judgment entered 2 October 1995 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 24 September 1996.

Baker, Jenkins, Jones & Daly, P.A., by Ronald G. Baker and Kevin N. Lewis, for plaintiff-appellant.

Ward and Smith, P.A., by Ryal W. Tayloe, A. Charles Ellis, and Frank A. Cassiano, Jr., for defendants-appellees Wallace E. Beddard, Sr. and Donna H. Beddard.

Gaylord, McNally, Strickland & Snyder, L.L.P., by Danny D. McNally, for defendants-appellees Gerald Wayne Briley and Joan S. Briley.

James M. Stanley, Jr. for defendants-appellees Joe and Linda Quinerly (no brief filed).

JOHN, Judge.

Plaintiff appeals the trial court's grant of summary judgment to defendants and denial of its like motion. We affirm.

Relevant background information is essentially undisputed and is as follows: On 11 October 1991, defendant Wallace E. Beddard Sr. (Beddard) was assisting defendant Gerald Wayne Briley (Briley) with tree trimming at the home of defendants Joe and Linda Quinerly (the Quinerlys) when Beddard was struck by a tree limb which Briley had cut. Beddard and his wife Donna H. Beddard (the Beddards) subsequently instituted a tort action against Briley, his wife Joan S. Briley and the Quinerlys for injuries Beddard suffered as a result of the accident.

At the time Beddard was injured, there was in effect a homeowners' insurance policy (the policy) issued by plaintiff to Briley and his wife. The couple sought coverage, but plaintiff denied liability based upon the business use exclusion contained in the policy. While appearing on behalf of Briley and wife in the underlying tort action under a reservation of rights, plaintiff sought declaratory judgment as to its obligation under the policy in the instant action filed 9 January 1995.

Following depositions of Briley, Beddard and Joe Quinerly, the Beddards and plaintiff moved for summary judgment. At a subsequent hearing, the court denied plaintiff's summary judgment motion and allowed that of the Beddards in an order entered 2 October 1995.

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The court's order further stated "that Defendant Gerald Wayne Briley and Joan S. Briley are afforded liability insurance coverage under Plaintiff's policy." Plaintiff appeals.

Summary judgment may be granted in a declaratory judgment action, *Threatte v. Threatte*, 59 N.C. App. 292, 294, 296 S.E.2d 521, 523 (1982), *appeal dismissed*, 308 N.C. 384, 302 S.E.2d 226 (1983), and the scope of appellate review from allowance of a summary judgment motion therein is the same as for other actions, N.C.G.S. § 1-258 (1996); *Dickey v. Herbin*, 250 N.C. 321, 325, 108 S.E.2d 632, 635 (1959). Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions and affidavits show no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56 (1990); *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665, 449 S.E.2d 240, 242 (1994), *disc. review denied*, 339 N.C. 737, 454 S.E.2d 648 (1995).

Plaintiff in its brief advances the single contention that the trial court's ruling was based upon its erroneous determination that Briley's activities were not excluded from coverage by the following pertinent policy language:

Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to **bodily injury or property damage**:

....

b.(1) arising out of or in connection with a **business** engaged in by an **insured**. This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance, involving a service or duty rendered, promised, owed, or implied to be provided because of the nature of the **business**.

Plaintiff argues Briley's tree trimming constituted a business within the meaning of the foregoing provision. We note at the outset that the specific "business use" exclusion language in the policy has not been considered extensively by our courts. In *Nationwide Mutual Fire Ins. Co. v. Johnson*, 121 N.C. App. 477, 482, 466 S.E.2d 313, 316 (1996), this Court held the provision to be inapplicable. In that case, employees of the insured, owner of a painting company, gathered at his home. *Id.* at 478, 466 S.E.2d at 314. However, the insured had no work to be done that day. *Id.* While at the insured's home, one of the employees began operating a boom and cherry-

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picker used in the company's painting operation. *Id.* The employee was killed when the boom came in contact with a live wire. *Id.* Because the record in no way indicated that decedent and the insured were involved in business activity at the time of the accident, we determined the business use exclusion in the policy at issue did not apply, and did not reach the question of whether the painting company constituted a "business" within the meaning of the exclusion. *Id.* at 482, 466 S.E.2d at 316.

In *Nationwide Mutual Fire Ins. Co. v. Nunn*, 114 N.C. App. 604, 606, 442 S.E.2d 340, 342 (1994), *disc. review denied*, 336 N.C. 782, 447 S.E.2d 426 (1994), this Court was called upon to interpret the effectiveness of a business use exclusion identical to that *sub judice*. In *Nunn*, we determined that the public bed and breakfast and reception site establishment operated by the insureds was a business under the terms of the policy in question. *Id.* However, the case turned on whether the injuries suffered when a guest was bitten by a dog were "in connection with" or "arose out of" that business. *Id.* at 607, 442 S.E.2d at 342. The issue presented herein, therefore, specifically whether part-time labor for which compensation has been received falls within the business use exclusion, is one of first impression.

The meaning of specific language used in an insurance policy is a question of law. *Trust Co. v. Insurance Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). When the language is clear and unambiguous, a policy provision will be accorded its plain meaning. *Walsh v. Insurance Co.*, 265 N.C. 634, 639, 144 S.E.2d 817, 820 (1965). However, when language is subject to more than one interpretation, a policy provision is to be liberally construed so as to afford coverage whenever possible by reasonable construction. *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986).

Further,

[i]t is the general rule that where a provision in a policy of insurance is susceptible of two interpretations, *when considered in the light of the facts of the case*, one imposing liability, the other excluding it, the provision will be construed against the insurer.

Roach v. Insurance Co., 248 N.C. 699, 701, 104 S.E.2d 823, 824-25 (1958) (emphasis added) (citations omitted).

Finally, it is well settled in this jurisdiction that the rules of construction governing interpretation of insurance provisions extending coverage differ from those governing provisions which exclude coverage. *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986). While the latter are to be construed broadly, exclusionary provisions are not favored and will be construed against the insurer if ambiguous. *Id.*

[1] Bearing the foregoing principles in mind, we examine the instant policy. Definitions contained within a policy are applied when construing its terms. *Woods v. Insurance Co.*, 295 N.C. 500, 505-06, 246 S.E.2d 773, 777 (1978). The policy defines business to “include[] trade, profession or occupation.” Webster’s Third New International Dictionary (1968) indicates trade is “the business one practices or the work in which one engages regularly.” *Id.* at 2421. Profession is “a principal calling, vocation, or employment.” *Id.* at 1811. Occupation is “the principal business of one’s life: a craft, trade or other means of earning a living.” *Id.* at 1560. All three definitions, each containing similar phraseology (“the business,” “principal calling,” and “the principal business”) thus signify that “business” as defined in the policy refers to an individual’s paramount means of earning a livelihood.

[2] Nonetheless, plaintiff in essence relies upon the definition of “trade” as “work in which one engages regularly” to argue Briley’s tree trimming activity was encompassed within the business use exclusion. Plaintiff’s position is unfounded.

We first note that the modifier “the” preceding “work” and “business” in the dictionary definition may likewise be reasonably interpreted as designating the *primary* employment in which an individual engages regularly. This interpretation of the definition is reasonable particularly when viewed in context with “occupation” and “profession.” See *State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944) (“[n]oscitur a sociis is a rule of construction applicable to all written instruments”); see also *Morecock v. Hood*, 202 N.C. 321, 323, 162 S.E. 730, 731 (1932) (“[t]he maxim is, *noscitur a sociis*: the meaning of a doubtful word may be ascertained by reference to the meaning of words with which it is associated”).

In addition, examining the “facts of the case,” *Roach*, 248 N.C. at 701, 104 S.E.2d at 825, we observe that uncontradicted evidence in the record reflects that Briley was a full time employee of DuPont, where he worked as a spinning operator. This position was his “pri-

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mary occupation” and “primary source of income.” Briley considered tree trimming at best to be a sideline or hobby, and did “not consider [himself] to be engaged in any other type of trade, occupation or profession with regard to [his] tree trimming activities.” He stated he began cutting trees in his own yard which “got to be something [he] enjoyed,” that “from there it was helping out at the church to get some trees down,” that “it just sort of grew as time went on.” Briley did not always charge for a job, and when doing so presented no written bill, but simply “[told customers] how much they owe[d] [him].” Moreover, he neither advertised, nor listed in the white or yellow pages of the telephone directory, nor had stationery, letterhead, business cards or billing invoices.

However, the record also indicates Briley engaged in tree trimming over several years, sometimes as much as twenty hours per week, was frequently compensated, and had earned approximately \$6,000 per year from the activity in each of the three years preceding the accident.

Assuming *arguendo* that a permissible interpretation of “trade” would include Briley’s tree trimming, therefore, the word, “when viewed in the light of the facts of the [instant] case,” *Roach*, 248 N.C. at 701, 104 S.E.2d at 825, remains capable of differing reasonable constructions, one favoring coverage, the other not. In such event, “trade” must be construed so as to afford coverage. *Id.*; see also *State Capitol Ins.*, 318 N.C. at 538, 350 S.E.2d at 68 (clause contained in policy of insurance which is subject to two reasonable meanings, one providing for coverage and the other not, must be construed in favor of finding coverage).

The Georgia appellate court, in a 1991 case involving similar facts, reached a like result. In *United Services Auto. Ass’n v. Lucas*, 408 S.E.2d 171 (Ga. Ct. App. 1991), plaintiff insurance company denied coverage under the identical exclusionary provision at issue herein following injury to a child in the care of the insured babysitter. *Id.* at 171-172. The record revealed the insured had been a licensed day care operator for approximately four years, regularly took care of children, earned approximately \$100 per week, and reported all income to the IRS while deducting expenses associated with her babysitting. *Id.* at 172. On the other hand, further evidence indicated that no more than seven children were cared for during the year of the injury, four of whom were her own grandchildren, and “that she offered her services as both a favor and a convenience to parents

who lived in the neighborhood.” *Id.* at 173. Noting that the policy contained “no definition of business other than to state that it includes ‘trade, profession, or occupation,’ ” the court stated it was “unable to conclude that the facts of this case come within the exclusion” set out in the policy. *Id.* As in this jurisdiction, Georgia requires construction in favor of the insured if policy language is susceptible to two different constructions, and the court based its decision in part on this principle. *Id.*

In the event we should determine, as we have, that the policy definitions of “business” refer to an individual’s principal work activity, plaintiff further insists that use of the word “includes” in the policy permits an alternative definition. Specifically, plaintiff urges us to adopt Black’s Law Dictionary definition of “business” as “[e]mployment, occupation, profession, or commercial activity engaged in for gain or livelihood,” Black’s Law Dictionary 198 (6th ed. 1990). We decline to do so.

First, “includes” implies the existence of a comprehensive definition somewhere beyond the face of the policy. As stated above, exclusionary provisions are not favored by the law, and we believe the burden is on the insurance company to set forth clearly and unambiguously a definition of “business” that eliminates guesswork on the part of its insured. *Cf. Gaynor v. Williams*, 366 So.2d 1243, 1244 (Fla. Dist. Ct. App. 1979) (citations omitted) (“[s]ince the word ‘includes’ is a term of expansion, the definition here must be read to mean that business [as defined in the policy] includes, but *is not limited to* the ‘trade, profession or occupation’ of the insured”; hence banker’s “business pursuits included” his operation of an apartment house, and umbrella personal liability policy containing business pursuits exclusion did not cover accident arising out of apartment house operation).

Second, it is well established that in construing terms of a contract of insurance,

words . . . should, in the absence of evidence of a contrary intent, be given the meaning which they have for laymen in . . . daily usage, rather than a restrictive meaning which they may have acquired in legal usage.

Insurance Co. v. Insurance Co., 266 N.C. 430, 438, 146 S.E.2d 410, 416 (1966). Accordingly, definitions contained in “standard, nonlegal dictionaries may be a more reliable guide to the

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construction of an insurance contract than definitions found in law dictionaries.” *Id.*

Finally, plaintiff in the main controls the language set out in policies of insurance which it issues. Had it desired “business” to be defined as provided in Black’s Law Dictionary, it was in a position to draft its policies of insurance accordingly. *See Insurance Co. v. Insurance Co.*, 266 N.C. at 437-38, 146 S.E.2d at 416 (“[w]hen an insurance company, in drafting its policy of insurance, uses a ‘slippery’ word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term”).

In sum, based upon the definition of “business” in the policy, the provision as applied to Briley’s activities as a tree trimmer is ambiguous. As a result of this ambiguity, the phrase must be broadly interpreted in favor of coverage and therefore does not exclude Briley’s tree trimming. Defendants thus met their burden of showing they were entitled to judgment as a matter of law, and the trial court did not err in the entry of its 2 October 1995 order.

Affirmed.

Judges WYNN and McGEE concur.

RONALD E. SHACKELFORD, ET. AL., PETITIONERS V. CITY OF WILMINGTON,
RESPONDENT

No. COA96-1064

(Filed 7 October 1997)

**1. Municipal Corporations § 58 (NCI4th)— annexation—
development for urban purposes—classification of tracts—
subdivision test**

The trial court did not err when reviewing an annexation ordinance by upholding the City’s classification of certain tracts as commercial or institutional under the subdivision test for determining whether a tract is sufficiently developed for urban purposes so as to qualify for annexation. The court’s findings show that approximately twenty-five percent of each tract was directly and actively being used for commercial or institutional

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purposes and petitioners failed to show that the usage was insignificant as compared to the noncommercial or noninstitutional use applicable to the remainder of the tracts.

**2. Municipal Corporations § 58 (NCI4th)— annexation—
development for urban purposes—classification of tracts—
Airlie Gardens**

The trial court did not err when reviewing an annexation ordinance by upholding the City's classification of the Airlie Gardens tract as sufficiently developed for urban purposes to qualify for annexation. There is ample evidence of significant use of the entire tract as commercial property; petitioner's contention that this use is only incident to the Corbett family's private use of the tract is not persuasive.

**3. Municipal Corporations § 58 (NCI4th)— annexation—
development for urban purposes—classification of tracts—
golf course and supporting acreage**

The trial court did not err in a disputed annexation by upholding the City's classification of a certain tract as commercial where the tract contained a golf course, driving range, and related improvements, with additional acreage for a lake used to irrigate the golf course, a creek headwaters, and a buffer area. Significant portions of the acreage surrounding the area containing the golf course, driving range and related improvements were actively being used for drainage and irrigation of that area and thus were essential to support the commercial use.

**4. Municipal Corporations § 58 (NCI4th)— annexation—
development for urban purposes—classification of tracts—
property in active development**

The trial court properly found in a disputed annexation that a tract was subdivided into lots and tracts five acres or less at the time of annexation where the property was in active development. Moreover, the City's method of estimating the degree of subdivision based on county tax maps, aerial photographs, actual surveys, and other means was reasonably reliable under the circumstances.

Appeal by petitioners from order and judgment entered 10 April 1996 by Judge Narley L. Cashwell in New Hanover County Superior Court. Heard in the Court of Appeals 12 May 1997.

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[127 N.C. App. 449 (1997)]

Shipman & Associates, L.L.P., by Gary K. Shipman and C. Wes Hodges, II, for petitioners.

Thomas C. Pollard for respondent.

McGEE, Judge.

In this appeal, petitioners challenge the City of Wilmington's proposed annexation of certain property on the ground that the property was not sufficiently developed for urban purposes pursuant to N.C. Gen. Stat. § 160A-48(c)(3).

In September 1995, the City adopted a resolution approving a proposed annexation service plan (the Plan) including property owned by petitioners. The Plan was discussed at a public hearing in October 1995. In November 1995, the City amended the plan and enacted an annexation ordinance. Petitioners filed this action seeking judicial review of the annexation ordinance in superior court. The trial court subsequently allowed petitioners to file an amended petition and the City answered. The matter was heard during the 13 February 1996 special session of New Hanover County Superior Court, Judge Narley L. Cashwell presiding. On 10 April 1996, the trial court affirmed the annexation ordinance and denied petitioners' prayers for relief. Petitioners appeal.

Petitioners contend various tracts to be annexed are not sufficiently developed for urban purposes so as to qualify for annexation under G.S. § 160A-48(c)(3). G.S. § 160A-48(c)(3) provides, in pertinent part:

- (c) Part of all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:

* * *

- (3) It is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are *used* for residential, commercial, industrial, institutional or governmental purposes, and is *subdivided* into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.

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G.S. § 160A-48(c)(3) (1994) (emphasis added). Pursuant to this statute, to qualify for annexation, an area must satisfy both

- (1) *the use test*—that not less than 60 percent of the lots and tracts in the area must be in actual use, other than for agriculture, and
- (2) *the subdivision test*—not less than 60 percent of the acreage which is in residential use, if any, and is vacant must consist of lots and tracts of five acres or less in size.

Lithium Corp. v. Bessemer City, 261 N.C. 532, 538, 135 S.E.2d 574, 579 (1964). Some actual, minimum urbanization of a proposed annexation area is required for annexation. *Thrash v. City of Asheville*, 327 N.C. 251, 257, 393 S.E.2d 842, 846 (1990). In addition, N.C. Gen. Stat. § 160A-54 (1994) requires a municipality to “use methods calculated to provide reasonably accurate results” when determining the degree of subdivision under G.S. § 160A-48. *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 26, 265 S.E.2d 123, 127 (1980). In an appeal from the adoption of an annexation ordinance, “[w]here . . . the proceedings show prima facie that there has been substantial compliance with the statute, the burden is on the petitioners challenging the ordinance to show competent evidence that the City in fact failed to meet the statutory requirements.” *Asheville Industries, Inc. v. City of Asheville*, 112 N.C. App. 713, 719, 436 S.E.2d 873, 876 (1993).

Petitioners specifically challenge the City’s compliance with the subdivision test. First, they contend respondent incorrectly classified four tracts—the T.F. Holdings tract, the Division of Motor Vehicles (DMV) tract, the Airlie Gardens tract and the Duck Haven tract—as commercial or institutional/governmental and that these tracts should have been included in the total acreage calculation for determining compliance with the subdivision test. An area is improperly classified as to use if there is no evidence that the land is being used either directly or indirectly for the classified use. *See R.R. v. Hook*, 261 N.C. 517, 520, 135 S.E.2d 562, 565 (1964). “Where there has been no showing that the extent of industrial use was insignificant as compared to nonindustrial use, petitioner has failed to carry his burden to demonstrate a misclassification.” *Asheville Industries, Inc.*, 112 N.C. App. at 720-21, 436 S.E.2d at 877; *see also Scovill Mfg. Co. v. Town of Wake Forest*, 58 N.C. App. 15, 20, 293 S.E.2d 240, 244 (stating “[t]here has been no showing [by petitioner] that the extent of industrial use was insignificant as compared to any nonindustrial use”), *disc. review denied*, 306 N.C. 559, 294 S.E.2d 371 (1982). Thus, here petitioners had the burden to show that the extent of the use assigned to

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each challenged tract by respondent was insignificant as compared to uses other than the assigned use. We address petitioners' contentions on this issue as to each tract.

T.F. Holdings tract

[1] Petitioners contend the court erred in upholding the City's classification of the entire T.F. Holdings tract as commercial. They assert this tract should either have been split into a commercial area and a vacant area or classified in its entirety as vacant. We disagree. In support of its finding that the entire tract was being used for commercial purposes at the time of annexation, the trial court found the total tract was 13.76 acres of which 3.56 acres were occupied by a used car lot, repair shop and building and that the remaining 10.2 acres were wooded. The court further found that Webster Trask, a principal in T.F. Holdings, testified that the used car lot, repair shop and building were orally leased to persons but that the leases did not include the right to use the remaining portions of the tract. These findings show that approximately twenty-five percent of the tract was directly and actively being used for commercial purposes.

Petitioners assert this case is similar to *R.R. v. Hook* in which our Supreme Court held a 13.747 acre tract was improperly classified as industrial when one-tenth of the tract was used for parking while the remainder was vacant, unused land. *See Hook*, 261 N.C. at 520, 135 S.E.2d at 565. However, we find the twenty-five percent commercial use of the T.F. Holdings tract was much more substantial than the ten percent use at issue in *Hook*. We hold petitioners have failed to show that twenty-five percent usage of this tract was insignificant as compared to the noncommercial use applicable to the remainder of the tract and that the trial court did not err by upholding the City's classification of this entire tract as commercial.

DMV tract

Petitioners contend the trial court erred in upholding the City's classification of the entire DMV tract as institutional. We disagree. The trial court found the total tract was 15.8 acres of which 3.9 acres were occupied by a building and parking lot used by DMV and the Highway Patrol and that the tract was being used for institutional or governmental purposes at the time of annexation. The court also found there is a radio tower on the south edge of the parking lot and that the guide wires for this tower extend into the wooded area. As with the T.F. Holdings tract, approximately twenty-five percent of this

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tract was directly and actively being used for institutional purposes. In addition, as to this tract, some of the wooded land was being used for the radio tower guide wires. We hold petitioners have failed to show this institutional use was insignificant as compared to the use of the remaining portion of the tract and that the trial court did not err by finding this tract was used for institutional or governmental purposes.

Airlie Gardens tract

[2] Petitioners contend the trial court erred by upholding the City's classification of the Airlie Gardens tract as commercial. We disagree. The trial court found the total tract was 73.5 acres consisting of gardens, ponds, wooded areas and open lawns with driveways winding throughout these areas and was owned by the Corbett Packaging Company. The court found that over the years the gardens have been open to the public upon payment of an admission fee for various lengths of time ranging from one and one-half months up to seven months of the year. The court found certain flowering plants are planted in the wooded area and that an irrigation system is located in the wooded area. The court found that Airlie Gardens distributed advertisements and brochures soliciting public visitation of the gardens and that the gardens are also available for weddings and receptions and have been used for film making. In addition, testimony at trial indicated that two parking areas on the tract were available for public use.

We find ample evidence of significant use of the entire Airlie Gardens tract as commercial property. We are not persuaded by petitioners' contention that this commercial use is only incidental to the Corbett family's private use of the tract. Such a concurrent use does not require reclassification of the property. *See Scovill Mfg. Co.*, 58 N.C. App. at 19, 293 S.E.2d at 244. We hold the trial court's findings upholding the City's classification of this tract as commercial are amply supported by the record evidence and these findings in turn support the court's legal conclusions.

Duck Haven tract

[3] Petitioners also contend the court erred in upholding the City's classification of the Duck Haven tract as commercial. They contend 125.51 acres of this tract should have been classified as vacant. We disagree. Respondent classified 243.21 acres of the Duck Haven tract as commercial and the trial court upheld this classification. A 2.79 acre portion, which is separated from the rest of the tract by a road,

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was classified by the City as vacant. The trial court found that 115.7 acres of the 243.21 acres classified as commercial were used as a golf course, driving range, and related improvements. The court also found that the tract contained a lake, that the headwaters of Bradley Creek were located on a corner of the property, and that a drainage ditch extended from the golf course to Bradley Creek. The court found the lake was used to irrigate the golf course and that the lake, the creek headwaters area and buffer areas for the golf course and driving range covered acreage in addition to the 115.7 acres actually occupied by the golf course, driving range and improvements. The court found the remainder of the tract was wooded and that two acres of the tract housed a private residence.

These findings support the trial court's decision to uphold the City's classification of 243.21 acres of this tract as commercial. Our Supreme Court has upheld a classification of parcels contiguous to industrial parcels as industrial when the evidence showed the contiguous parcels were being actively used to support the industrial use of the industrial parcels and were essential to this use. *Food Town Stores*, 300 N.C. at 28-29, 265 S.E.2d at 128. The supporting uses on these parcels included erosion control improvements. *Id.* at 28, 265 S.E.2d at 128. Similarly here, significant portions of the acreage surrounding the 115.7 acre area containing the golf course, driving range and related improvements were actively being used for drainage and irrigation of the 115.7 acre area and thus were essential to support the commercial use on the 115.7 acre area. We hold the trial court did not err by upholding the City's classification of 243.21 acres of the Duck Haven tract as commercial.

As to all of these tracts, petitioners also assert error in the City's method of classifying an entire tract as commercial, industrial, governmental or institutional if any portion of the tract was used for such a purpose without evaluating the significance of this use to the overall tract. Since we have held that the uses at issue on these tracts were significant in relation to the tracts as a whole, we need not decide whether the City's use of this method, in general, was improper as the classifications made are supported by the evidence presented and comport with the requirements of G.S. § 160A-48(c)(3).

Landfall Property

[4] Petitioners next contend that nine areas within the Pembroke Jones Park at the Landfall Development (Landfall property) were

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improperly categorized by the City and by the trial court as subdivided into tracts five acres or less in size under the subdivision test in G.S. § 160A-48(c)(3). We disagree. Petitioners contend that in order for land to be considered subdivided for annexation purposes it must be subdivided into lots that “are located on streets laid out and open for travel and [that] have been sold or offered for sale as lots” pursuant to N.C. Gen. Stat. § 105-287(d) (1995). This tax statute has been applied by our appellate courts as a factor in assessing the degree of subdivision for annexation purposes. *See Thrash*, 327 N.C. at 255, 258, 393 S.E.2d at 845, 847; *Asheville Industries, Inc.*, 112 N.C. App. at 720, 436 S.E.2d at 877. However, in applying the subdivision test, the central inquiry is the degree of actual urbanization of the proposed area. *See Thrash*, 327 N.C. at 256-57, 393 S.E.2d at 846; *Asheville Industries, Inc.*, 112 N.C. App. at 719-20, 436 S.E.2d at 877. Other primary considerations are whether the methods used by the City for assessing the degree of subdivision are “reasonably reliable,” *see* G.S. § 160A-54(3), and whether the record evidence used by the City reflects the actual condition of the property. *See Thrash*, 327 N.C. at 256-58, 393 S.E.2d at 845-47.

Here, the court’s findings and record evidence showed the Landfall property was in active development. The trial court found the Landfall property consisted of nine vacant areas totaling approximately 154 acres. The court found these areas were being developed by Landfall Associates, the owners of most of the property in these areas. The court found final subdivision plats had been recorded in the New Hanover County registry in accordance with the county’s subdivision regulations at the time the annexation plan was adopted and that these plats show the entire area as being subdivided into lots and tracts five acres or less in size. The court found all of the recorded plats indicate they are based on actual surveys of the property. One street, Arboretum Drive, was paved and open to travel. Other streets in the subdivision were not open for travel although some of these were dirt roads. The court also found, at the time of the public hearing on the annexation, that Landfall Associates had sold twelve lots in two areas of the development by reference to subdivision plats. The trial court made other extensive findings all tending to show the Landfall property was actively being developed as a subdivision at the time of the public hearing. The actual state of the Landfall property contrasts sharply with the lack of active development of the properties at issue in *Thrash* and *Asheville Industries*. In addition, we find the City’s method of estimating the degree of subdivision based on county tax maps, aerial photographs, actual surveys,

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and other means was reasonably reliable under the circumstances. We hold the record evidence supports the trial court's finding that the Landfall property was subdivided into lots and tracts five acres or less in size at the time of annexation.

Given our disposition of these contentions, we find it unnecessary to address petitioners' remaining contentions or the City's cross-assignment of error.

Affirmed.

Judges EAGLES and SMITH concur.

CHICAGO TITLE INSURANCE CO., PLAINTIFF v. ALFRED WETHERINGTON,
DEFENDANT

No. COA96-1455

(Filed 7 October 1997)

**1. Adverse Possession § 1 (NCI4th)— residence tract—
actual, exclusive and continuous possession—statutory
period—acquisition of title**

There was no error in the trial court's conclusion that a couple who resided on the property in question acquired title to the property by adverse possession where the court found that the residents (1) had actual, exclusive and continuous possession for the statutory period, (2) had exercised domain over the premises and generally engaged in activities consistent with the ownership of a rural home site, and (3) had obtained three separate loans which were secured by deeds of trust on the residence tract.

**2. Quieting Title § 28 (NCI4th)— cloud on title—prima facie
case**

Plaintiff title insurer established a prima facie case for removing a cloud on title by showing that plaintiff title insurer had an interest in the residence tract in question by virtue of having acquired title from another party and that defendant has asserted an interest adverse to that of plaintiff by contending that the original deed from defendant and his wife to plaintiff's predecessors in title was void because it contained an ambiguity in description and was a deed of gift that was not timely recorded.

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3. Deeds § 15 (NCI4th)— ambiguity in description—parties aware of location—deed not void

The trial court's finding and conclusion that the original deed from defendant to plaintiff's predecessors in title was void because of an ambiguity in the beginning point in the description were erroneous in this action to remove cloud on title because there was ample evidence to show that defendant grantor intended to convey a .38-acre residence tract to the grantees and that defendant and the grantees were aware of the location of this tract despite the ambiguous description.

4. Deeds § 17 (NCI4th)— recitation of consideration—not deed of gift

The trial court erred by finding that a deed was a deed of gift and void because it was not recorded within two years of its execution where the deed recited a consideration of \$10.00 and other good and valuable consideration, and defendant failed to overcome the presumption that the recital of consideration in the deed was correct.

Appeal by defendant from Order entered 15 March 1996 by Judge W. Osmond Smith, III in Craven County Superior Court. Heard in the Court of Appeals 25 August 1997.

Everett, Warren, Harper & Swindell, by Edward J. Harper, II, for plaintiff-appellee.

Henderson, Baxter & Alford, P.A., by David S. Henderson and Brian J. Gatchel, for defendant-appellant.

WALKER, Judge.

By deed dated 14 October 1959, defendant and his wife conveyed to William S. Wetherington and his wife, Canarie Lee Wetherington (the Wetheringtons), a .38-acre tract of land in Craven County (the residence tract). The deed contained the following description of the tract:

That certain lot, tract or parcel of land situate[d], lying and being in No. 1 Township, Craven County, North Carolina, and being bounded on the north by the River Road and on the east, south and west by the lands of Alfred Wetherington and BEGINNING at a stake on the south side of the River Road, said [stake] being located 20 feet from the center line of said road, and running

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thence South 11 deg. 15 min. East, 125 feet to a stake; thence South 78 deg. 45 min. West, 131 feet to a stake; thence North 11 deg. 15 min. West 125 feet to a stake on the side of said road and 20 feet from the center line of said road; thence with the side of said road North 78 deg. 45 min. East 131 feet to the beginning and containing 38/100 of an acre of land, more or less.

The deed was later recorded on 11 June 1963. The description set out above correctly described a .38-acre tract; however, because the description of the beginning point was incorrect, the tract could not be precisely located on the ground. Despite the problem associated with locating the beginning point, a subsequent survey was conducted in 1988 where the .38-acre residence tract was located within a 16-acre tract which was owned by defendant. The surveyor testified at trial that when he went onto the property to conduct the survey, he observed the Wetheringtons' house and other improvements on the residence tract. By using information obtained from the previous deeds and from the tax office, he was able to locate all the improvements within the described boundaries. Thus, the .38-acre residence tract described in the original deed and in the subsequent survey in 1988 are the same, except that the beginning point has been more accurately described.

The trial court found that the Wetheringtons entered into possession of the residence tract in 1962 and continued to occupy it until their separation and divorce in 1984. Since their divorce, Canarie Wetherington has occupied the residence tract.

After becoming the owner of the residence tract, the Wetheringtons obtained three separate loans from the Federal Land Bank of Columbia (the lender) which were secured by deeds of trust on the residence tract. Each deed of trust contained the same property description as the original deed.

In 1986, the Wetheringtons defaulted on the third note and the lender initiated a foreclosure proceeding. Acting pursuant to the power of sale clause contained in the deed of trust, the lender purchased the property at the foreclosure sale and obtained a title policy insured by plaintiff. Subsequently, in 1991, the lender's successor in interest, Farm Credit Bank of Columbia, conveyed the property to East Carolina Farm Credit, ACA (ACA).

As a result of the ambiguous description in the deed and pursuant to the terms of the title insurance policy, the plaintiff was required to

pay ACA the sum of \$46,562.93. In return for such payment, ACA conveyed the residence tract to plaintiff.

Plaintiff instituted the present action on 20 April 1992, claiming breach of warranty, removal of cloud on title, adverse possession, unjust enrichment, and reformation of deed. Plaintiff asked the court to declare it to be the record owner of the residence tract and to have the deed reformed to reflect the proper description of the property.

After a hearing, the trial court made extensive findings and the following conclusions of law: (1) that the Wetheringtons did not become the owners of the residence tract by virtue of the 1959 deed from defendant because the description was patently ambiguous, and the deed of gift was not recorded within two years; (2) that by at least the end of 1982, the Wetheringtons had obtained title to the residence tract by virtue of adverse possession; and, (3) that plaintiff was the owner of the residence tract, free and clear of any claims of the defendant.

The trial court awarded the residence tract to plaintiff on the basis of adverse possession. Although we affirm the trial court's decision, we find that plaintiff's evidence also supports a judgment declaring that title be quieted in favor of plaintiff and that defendant has no right, title, or interest in the residence tract.

In all actions tried without a jury, the trial court is required to make specific findings of fact, state separately its conclusions of law, and then direct judgment in accordance therewith. N.C. Gen. Stat. §1A-1, Rule 52(a)(1) (1990). It is well settled law that although the sufficiency of the evidence to support the trial court's findings may be raised on appeal, the "appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110-111, 316 S.E.2d 246, 252-253 (1984).

[1] In order to acquire title to land through adverse possession, a party must show actual, open, hostile, exclusive and continuous possession of the land claimed for twenty years under known and visible boundaries. *Curd v. Winecoff*, 88 N.C. App. 720, 722, 364 S.E.2d 730, 732 (1988). The trial court made the following extensive findings: (1) that the Wetheringtons had actual, exclusive and continuous possession for the statutory period; (2) that the Wetheringtons had exer-

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[127 N.C. App. 457 (1997)]

cised dominion over the premises and “generally engaged in activities consistent with the ownership of a rural home site;” and (3) that they had obtained three separate loans which were secured by deeds of trust on the residence tract. Therefore, we find no error in the trial court’s conclusion that the Wetheringtons acquired title to the residence tract by adverse possession.

[2] In its second claim for relief, plaintiff alleges that the existence of the ambiguity in the deed from defendant to the Wetheringtons constituted a cloud on the title and asked the trial court to quiet title for plaintiff. An action to remove a cloud on title:

[M]ay be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims . . . , and a decree for the plaintiff shall debar all claims of the defendant in the property of the plaintiff then owned or afterwards acquired. . . .

N.C. Gen. Stat. §41-10 (1996). In order to establish a *prima facie* case for removing a cloud on title, a plaintiff must meet two requirements: (1) plaintiff must own the land in controversy, or have some estate or interest in it; and (2) defendant must assert some claim in the land which is adverse to plaintiff’s title, estate or interest. *Wells v. Clayton*, 236 N.C. 102, 107, 72 S.E.2d 16, 20 (1952). By bringing a suit pursuant to this statute, a plaintiff is not demanding possession of the land but is merely stating that defendant has no right, title or interest adverse to his interest. *Development Co., Inc. v. Phillips*, 278 N.C. 69, 77, 178 S.E.2d 813, 818 (1971). The purpose of this statute is to “free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion. . . .” *Id.* (quoting *Christman v. Hilliard*, 167 N.C. 4, 8, 82 S.E. 949, 951 (1914)). Further, once a plaintiff establishes a *prima facie* case for removing a cloud on title, the burden rests upon the defendant to establish that his title to the property defeats the plaintiff’s claim. *Id.* at 78, 178 S.E.2d at 818-819.

In this case, plaintiff has established a *prima facie* case for removing a cloud on title. First, plaintiff has an interest in the residence tract, having acquired title from ACA. Second, defendant has asserted an interest which is adverse to that of plaintiff. Defendant contends that the original deed from him and his wife to the Wetheringtons was void because it contained an ambiguity in the description and it was a deed of gift which was not recorded within

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two years of its execution. Since plaintiff has established a *prima facie* case for removing a cloud on title, the burden rests upon defendant to produce evidence that his title in the residence tract is superior to that of plaintiff.

[3] The trial court found that “[b]y virtue of the indefiniteness of a beginning point, the legal description in such conveyance is patently ambiguous.” To resolve cases in which a deed contains an ambiguous description, “the courts have formulated various rules of construction and techniques to locate the boundaries of deeds whose descriptions are less than ideal.” Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster’s Real Estate Law in North Carolina* §10-36 (4th ed. 1994). The most common rule of construction used by the courts is to “gather the intention of the parties from the four corners of the instrument.” Hetrick & McLaughlin, *supra*, at §10-36; *see also Board of Transportation v. Pelletier*, 38 N.C. App. 533, 536-537, 248 S.E.2d 413, 415 (1978). “The courts seek to sustain a deed if possible on the assumption that the parties intended to convey and receive land or they would never have been involved in the first place.” *Id.*; *see also Self Help Corp. v. Brinkley*, 215 N.C. 615, 619, 2 S.E.2d 889, 892 (1939).

In this case, it is clear that defendant intended to convey the .38-acre residence tract to the Wetheringtons. After the initial conveyance, the Wetheringtons moved onto the property and erected substantial improvements. They obtained three separate loans secured by deeds of trust on the residence tract for which they were required to sign affidavits stating that their ownership of the residence tract had never been questioned. Also, they testified at trial that the 1988 survey correctly depicted the residence tract. Further, in a 1986 affidavit, the defendant made an “express acknowledgment” that the Wetheringtons were the owners of the residence tract. Thus, there is ample evidence to support a finding that the defendant and the Wetheringtons were aware of the location of the residence tract despite the ambiguity contained in the description in the deed. Therefore, the trial court’s finding and conclusion that the deed was void because of this ambiguity was in error.

[4] The trial court also found that the deed was “without consideration and in fact was a gift deed recorded on June 11, 1963, more than two years after the date of its execution.” A deed of gift is void if it is not recorded within two years of its execution. *See* N.C. Gen. Stat. § 47-26 (1984).

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The original deed contained the usual recitals of a general warranty deed, including the following:

WITNESSETH: That the said Alfred Wetherington and wife, Mary E. Wetherington, parties of the first part, for and in consideration of TEN DOLLARS (\$10.00) and other good and valuable consideration to them in hand paid this day by the parties of the second part. . . .

A recital substantially the same as this one was present in *Pelaez v. Pelaez*, 16 N.C. App. 604, 192 S.E.2d 651 (1972), where this Court stated that “[o]rdinarily, the consideration recited in a deed is presumed to be correct.” *Id.* at 606, 192 S.E.2d at 652. Our Court went on to conclude that since the plaintiff did not offer any evidence to overcome the presumption that the recital of consideration in the deed was correct, the deed was given for valuable consideration and therefore was not a deed of gift.

Here, defendant has failed to overcome the presumption created by the recital of consideration in the deed. Therefore, the trial court’s finding and conclusion that the deed was a deed of gift was not supported by competent evidence and was in error.

At this point, it is also worthy to note the trial court’s finding that defendant acknowledged his purpose in contesting this case was to “attempt to obtain a dwelling house on his 16.5-acre tract of land at no cost to himself. . . .” Further, the trial court found that defendant’s position in this action contradicted the affidavit he filed in a 1986 civil action and “[was] both self-serving and thoroughly and inherently unreliable.”

Therefore, the trial court’s order which decreed that plaintiff was the sole owner of the residence tract as described in the 1988 survey, free and clear of any claim by defendant, is affirmed. The case is remanded to the trial court for modification of the order by finding that the original deed between the parties was not void due to the ambiguity contained in the description and was not a deed of gift since it was supported by valuable consideration. Furthermore, a copy of such order should be recorded in the real estate records of the Craven County Register of Deeds.

Affirmed and remanded with instructions.

Chief Judge ARNOLD and Judge MCGEE concur.

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[127 N.C. App. 464 (1997)]

STATE OF NORTH CAROLINA, PLAINTIFF v. JEROME WILLIAMS, DEFENDANT

No. COA96-1370

(Filed 7 October 1997)

1. Kidnapping § 16 (NCI4th)— second-degree kidnapping—sufficiency of evidence—removal—threats—intimidation

The State's evidence in a prosecution for second-degree kidnapping was sufficient to support the element of removal where the defendant forced the victim into and out of a car through threats and intimidation with what appeared to be a gun.

2. Kidnapping § 21 (NCI4th)— second-degree kidnapping—sufficiency of evidence—intent to terrorize—gun—threats

In a prosecution for second-degree kidnapping, the victim's testimony that defendant pointed what appeared to be a gun in her direction and threatened to kill her and that she was crying and hysterical was adequate to support the conclusion that defendant's intent was to terrorize the victim.

3. Evidence and Witnesses § 671 (NCI4th); Appeal and Error § 147 (NCI4th)— motion in limine—closing arguments—ruling deferred—not appealable—no objection at trial

Defendant's contention in a second-degree kidnapping prosecution that the trial court erred in deferring judgment on his motion *in limine* regarding the State's argument was not addressed on appeal. The trial court's ruling on the motion *in limine* was not appealable and defendant made no objections at trial.

4. Criminal Law § 445 (NCI4th Rev.)— State's closing argument—defense witness—characterized as drug dealer

The trial court did not err in not correcting on its own motion remarks made by the State in its closing argument which characterized a defense witness as a "drug dealer" where evidence elicited on cross-examination established that the witness had been convicted of possession with intent to sell and deliver cocaine and selling cocaine to an undercover officer.

5. Criminal Law § 1096 (NCI4th Rev.)— second-degree kidnapping—firearms enhancement—gun

The trial court improperly applied the firearms enhancement statute, N.C.G.S. § 15A-1340.16A, to defendant's second-degree

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kidnapping conviction where it appeared to the victim during the kidnapping that defendant had displayed a gun, but she testified at trial that the item displayed by defendant was actually a cigarette lighter. The trial court may not find that a gun was displayed where the evidence at trial conclusively establishes that no gun was actually displayed, even when it appeared to the victim at the time of the offense that a gun was displayed.

Appeal by defendant from judgment dated 3 July 1996 by Judge Henry W. Hight, Jr., in Durham County Superior Court. Heard in the Court of Appeals 21 August 1997.

Attorney General Michael F. Easley, by Special Deputy Attorney General Robert G. Webb and Assistant Attorney General Richard G. Sowerby, for the State.

Public Defender Robert Brown, Jr. and Assistant Public Defender Shannon A. Tucker, for the defendant appellant.

GREENE, Judge.

Jerome Williams (Defendant) was convicted of second degree kidnapping, and his sentence was enhanced by sixty months under section 15A-1340.16A of the North Carolina General Statutes for display of a firearm during the commission of the offense. Defendant appeals both the trial court's denial of his motion to dismiss at the close of all the evidence and the sentence enhancement.

We review a motion to dismiss in the light most favorable to the non-movant. *State v. Quick*, 323 N.C. 675, 682, 375 S.E.2d 156, 160 (1989). The following facts are therefore presented in the light most favorable to the State.

On 3 December 1995, Defendant went to the home of his ex-girlfriend, Felicia Leathers (Leathers), to confront her with his suspicions of her infidelity. Defendant and Leathers had at one time lived together, but had lived apart for several months prior to this visit. When Defendant arrived at Leathers' home, Defendant threatened Leathers with what she believed to be a gun and stated, "I came to kill you." Leathers left her house, but Defendant followed her outside and ordered her to return inside. Leathers refused to return inside; instead, she traveled with Defendant in a neighbor's car to Defendant's mother's home. Leathers testified that: "[o]nce I seen him almost get in [the car], I was like going to get out again and run and

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he told me don't, to get in. So I got on in [the car]." Leathers testified that when they arrived at Defendant's mother's house, "[h]e was telling me to get out the car and I was telling him I was scared, to give [away] the gun. I was not going to get out the car." Defendant again pointed what appeared to be a gun at Leathers, and Leathers went into the house with Defendant. Once they were inside his mother's house, Defendant confronted Leathers about his suspicions of her infidelity, demanded the return of jewelry which belonged to Defendant, and then allowed Leathers to leave.

At trial, the evidence conclusively established that the item which Leathers believed to be a gun at the time of the kidnapping was actually a cigarette lighter shaped like a gun. Leathers herself testified that she only saw the top, or barrel, of the gun Defendant used. When shown the cigarette lighter during her cross-examination and asked if it was the "weapon" Defendant had used during the kidnapping, Leathers testified: "Yes. This is it because this is the top of the thing I seen. . . . This is the gun I seen in his hand. That's the top of it. I don't know what the bottom of it looked like, I only seen the top of it." Counsel for Defendant then asked if the object Leathers had just identified in court as the "gun" used at the time of the kidnapping was a gun. Leathers replied: "No, it's a lighter."

At the close of all the evidence, Defendant moved for a dismissal of the second degree kidnapping charge, which the trial court denied. Prior to closing arguments, Defendant presented a motion *in limine* to the trial court seeking a court order forbidding the State to argue at closing that Defendant had raised non-issues at trial in order to distract the jury from the elements of the charge. The trial court deferred ruling on the motion, preferring to wait and see if such comments were made by the State. The State did in fact argue at closing that Defendant had raised non-issues. Defendant failed to object to these remarks at trial. The State's closing remarks also characterized the defense witness as a "drug dealer." Defendant likewise raised no objection at trial to these characterizations.

Finally, at sentencing for the second degree kidnapping conviction, the trial court found that Defendant had displayed a weapon during commission of a felony. Pursuant to N.C. Gen. Stat. § 15A-1340.16A, Defendant's sentence was enhanced by sixty months.

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The issues presented for review¹ are whether the trial court erred in: (I) refusing to dismiss the charge of second degree kidnapping at the close of all the evidence; (II) allowing the State to argue at closing (A) that Defendant raised non-issues at trial, and (B) that the defense witness was a “drug dealer”; and (III) enhancing Defendant’s sentence for display of a gun during commission of the offense.

I

A motion to dismiss is properly denied if there is substantial evidence of each essential element of the offense presented at trial. *State v. Roseborough*, 344 N.C. 121, 126, 472 S.E.2d 763, 766 (1996) (quoting *Quick*, 323 N.C. at 682, 375 S.E.2d at 160). “Substantial evidence” consists of “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S.E.2d 285, 289 (1995), *aff’d per curiam*, 343 N.C. 119, 468 S.E.2d 57 (1996) (quoting *Pamlico Tar River Foundation v. Coastal Resources Comm.*, 103 N.C. App. 24, 28, 404 S.E.2d 167, 170 (1991)). In determining whether substantial evidence existed to support each essential element, the evidence is to be considered in the light most favorable to the State, giving the State every reasonable inference arising from the evidence. *Id.*; *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

In this case, the elements charged in Defendant’s indictment for second degree kidnapping were (i) removal, and (ii) for the purpose of terrorizing Leathers.

A

[1] Defendant first argues there was insufficient evidence of removal to support the second degree kidnapping charge. We disagree.

“It is the fact, not the distance of forcible removal of the victim that constitutes kidnapping.” *State v. Lowry* and *State v. Mallory*, 263 N.C. 536, 541, 139 S.E.2d 870, 874 (citing 1 Am. Jur. 2d *Abduction and Kidnapping* § 18), *cert. denied*, 382 U.S. 22, 15 L. Ed. 2d 16 (1965); *State v. Fulcher*, 294 N.C. 503, 522, 243 S.E.2d 338, 351 (1978) (rejecting argument that removal requires moving the victim a substantial distance).

The State’s evidence shows that Defendant forced a hysterical Leathers both into and out of the car through threats and intimidation

1. Defendant failed to argue additional assignments of error before this Court. Under N.C. R. App. P. 28(a), these assignments of error are deemed abandoned. *State v. Davis*, 68 N.C. App. 238, 245, 314 S.E.2d 828, 833 (1984).

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with what appeared to be a gun. This evidence is such that a reasonable mind might accept it to support the conclusion that Leathers was forcibly removed by Defendant.

B

[2] Defendant also contends that the evidence does not support a finding that Defendant intended to terrorize Leathers. We disagree.

“Terrorizing is defined as ‘more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension.’ ” *State v. Davis*, 340 N.C. 1, 24, 455 S.E.2d 627, 639 (quoting *State v. Moore*, 315 N.C. 738, 745, 340 S.E.2d 401, 405 (1986)), *cert. denied*, — U.S. —, 133 L. Ed. 2d 83 (1995).

In this case, Leathers testified that Defendant pointed what appeared to be a gun in her direction and threatened to kill her. Both of the State’s witnesses testified that Leathers was crying and hysterical throughout the encounter. Taking the evidence in the light most favorable to the State, there existed such relevant evidence as a reasonable mind might accept as adequate to support the conclusion that Defendant’s intent was to terrorize Leathers.

II

A

[3] Defendant contends that the trial court erred in deferring judgment on Defendant’s motion *in limine* to prevent the State from arguing that Defendant raised non-issues at trial during the State’s closing argument.

“On appeal the issue is not whether the granting or denying of the motion *in limine* was error, as that issue is not appealable, but instead whether the evidentiary rulings of the trial court, made during the trial, are error.” *T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602-03, 481 S.E.2d 347, 349, *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997). In order to preserve an evidentiary ruling for appeal, an objection to the evidence must be made when it is offered at trial. *Id.* at 602, 481 S.E.2d at 349.

In this case, Defendant failed to object during the State’s closing argument to remarks alleging that defense counsel was raising non-issues. As the trial court’s ruling on the motion *in limine* is not appealable, and no objections were made to the evidentiary rulings from which Defendant complains, the State’s closing argument

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remarks that Defendant raised non-issues at trial are not properly before this Court and will not be addressed.

B

[4] Defendant next argues that the trial court erred in not correcting, on its own motion, remarks made by the State at closing argument which characterized the defense witness as a “drug dealer.”

“[C]ounsel may properly argue all the facts in evidence as well as any reasonable inferences drawn therefrom.” *State v. Worthy*, 341 N.C. 707, 709, 462 S.E.2d 482, 483 (1995) (citing *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975)).

The evidence elicited on cross-examination established that the defense witness had been convicted “of three counts of possession with the intent to sell and deliver cocaine . . . as well as two counts of selling cocaine to an undercover officer.” Therefore, characterizing the defense witness as a “drug dealer” was a reasonable inference from the evidence admitted at trial of prior convictions for selling drugs.

III

[5] Defendant’s final assignment of error is that the trial court erred in applying the sentence enhancement under section 15A-1340.16A. We agree that the sentence enhancement was improperly applied; therefore we remand for resentencing on Defendant’s second degree kidnapping conviction.

The relevant portion of the sentencing enhancement statute provides:

(a) If a person is convicted of [kidnapping] and the court finds that the person used, displayed, or threatened to use or display a firearm at the time of the felony, the court shall increase the minimum term of imprisonment to which the person is sentenced by 60 months. . . .

(b) Subsection (a) of this section does not apply [if] . . .

. . .

(3) The person did not actually possess a firearm about his or her person.

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It is reversible error for a trial court to submit an armed robbery charge to the jury where conclusive evidence at trial establishes that no actual gun was used. *See State v. Allen*, 317 N.C. 119, 343 S.E.2d 893 (1986) (holding evidence that a toy or cap pistol was used in the commission of a robbery made armed robbery a jury question, not a mandatory presumption). In *Allen*, our Supreme Court summarized prior case law as follows: “[I]f . . . evidence shows conclusively that the weapon was not what it appeared to be, then the jury should not be permitted to find that it was what it appeared to be.” *Id.* at 125, 343 S.E.2d at 897.

The reasoning in *Allen* is equally applicable to application of the sentence enhancement. The trial court may not find that a gun was displayed during the course of a felony where evidence at trial conclusively establishes that no gun was actually displayed, even where it appeared to the victim at the time of the offense that a gun was displayed. *See* N.C.G.S. § 15A-1340.16A(b)(3) (prohibiting sentence enhancement for possession of a firearm where the defendant “did not actually possess” a firearm).

In this case, at the time of the offense it appeared to the victim that the Defendant displayed a gun. However, the victim testified at trial that the item actually displayed by Defendant during commission of the offense was merely a cigarette lighter shaped like a gun. Therefore, it was error for the trial court to find that Defendant displayed a gun for purposes of the sentence enhancement.

Trial—no error.

Sentencing—remand for resentencing.

Judges WYNN and MARTIN, Mark D., concur.

SWANN v. LEN-CARE REST HOME

[127 N.C. App. 471 (1997)]

ANNIE C. SWANN AND CAROLYN D. SMITH, APPELLANTS v. LEN-CARE REST HOME, INC., ANDREW STEWART, AND SHELBLA NORRIS, APPELLEES

No. COA96-1283

(Filed 7 October 1997)

1. Hospitals and Medical Facilities or Institutions § 62 (NCI4th)—rest home—failure to restrain resident—negligence—sufficient evidence

The evidence was sufficient for the jury on the issue of negligence by defendant rest home and its employees in failing to restrain a ninety-eight-year-old resident at the time she fell and was seriously injured where the evidence tended to show that the resident's family had repeatedly requested that she be restrained when unattended because of her tendency to try to stand up; the resident had fallen at defendant's facility on two prior occasions; and a letter from one of the resident's physicians had requested that she be "restrained as necessary."

2. Negligence § 6 (NCI4th)—negligent infliction of emotional distress—insufficient evidence of emotional distress

Plaintiff failed to establish a claim for negligent infliction of severe emotional distress based on defendant rest home's failure to promptly give her accurate information about the nature and extent of injuries suffered by her grandmother in a fall where plaintiff testified that she did not go to the hospital the night of her grandmother's fall even after she was asked by a doctor whether she would authorize life support for her grandmother, and plaintiff admitted that she had never been to see a psychiatrist, psychologist, doctor or counselor for her alleged emotional distress and had never taken any medication to ease her condition.

Judge MARTIN, John C., concurring in part and dissenting in part.

Appeal by plaintiff from order entered 29 May 1996 by Judge Coy E. Brewer, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 9 September 1997.

Mrs. Annie C. Swann and Ms. Carolyn D. Smith, Mrs. Swann's granddaughter, sued the defendants, Len-Care, Andrew Stewart,

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and Shelbia Norris alleging negligence and negligent infliction of emotional distress. At the close of the plaintiff's evidence, the trial court granted Len-care's motion for directed verdict pursuant to Rule 50(a).

In 1990 when she was 94 years of age, Annie C. Swann began living in a group living facility, Len-Care. Len-Care is a rest home, not a nursing home, and provides the same type of care that might be found in an individual's home. Len-Care does not provide one-on-one care for each resident. From 1991 to 1994, Mrs. Swann's medical condition declined and her confusion became worse. Carolyn D. Smith, Swann's granddaughter and a plaintiff, would regularly visit her grandmother and was actively involved in her grandmother's care. During the five years her grandmother was at the defendant's facility, Ms. Smith had asked the staff at the facility to put restraints on her grandmother because of her grandmother's tendency to try to stand up when unattended. During visits by Ms. Smith, she would find Mrs. Swann in the lobby unattended and not restrained. Ms. Smith would always bring this to the attention of the staff at Len-care. In 1994, Dr. Rucker signed an order indicating that Mrs. Swann was to be "restrained PRN." PRN means as needed.

On 31 December 1994, Andrew Stewart, a supervisor from Len-Care called Ms. Smith and told her that her grandmother had fallen out of her wheelchair and was on her way to the hospital. Mr. Stewart told Ms. Smith that her presence was not needed and that she would receive another call after her grandmother returned from the hospital. Later that night Ms. Smith received another call indicating that her grandmother would be staying overnight at the hospital for observation. Ms. Smith's impression from the second call was that Mrs. Swann's injuries were "nothing serious." Shelbia Norris, an administrator at Len-Care, was not working the night Mrs. Swann fell but received a phone call from Mr. Stewart informing her that Mrs. Swann had fallen. Ms. Norris went to the rest home later that night, but did not call any of Mrs. Swann's family members or make any inquiries about Mrs. Swann at the hospital.

Ms. Smith's third telephone call came from Dr. Rucker at the hospital. He told Ms. Smith that he had put forty stitches in her grandmother's head and wanted to know whether or not he should put her on life support. Ms. Smith testified that this news made her "very upset and hurt." She felt she had been lied to by the defendants. On cross-examination, Ms. Smith admitted she had not seen a psycholo-

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gist or any other doctor relating to the severe emotional distress this incident had caused her. Ms. Smith stated that she had been busy with her mother and father since the incident and had not had time to seek treatment for herself.

At the close of the plaintiff's evidence, the trial judge granted Len-Care's motion for directed verdict on both the negligence and negligent infliction of emotional distress claims.

Plaintiff appeals.

The Lee Law Firm, P.A., by C. Leon Lee, II, for plaintiff-appellant.

Wishart, Norris, Henninger & Pittman, P.A., by G. Wayne Abernathy and Jim H. Joyner, Jr., for defendant-appellees.

EAGLES, Judge.

[1] We first consider whether the trial court properly granted a directed verdict in favor of all defendants on the negligence claim. "In ruling on a motion for directed verdict, plaintiff's evidence must be taken as true and all the evidence must be viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, with conflicts, contradictions, and inconsistencies being resolved in plaintiff's favor." *McMahan v. Bumgarner*, 119 N.C. App. 235, 237 457 S.E.2d 762, 763 (1995). The trial court should deny the motion if there is more than a scintilla of evidence to support each element of the non-movant's case. *Id.* As a general proposition, issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant. Generally, the better practice is for the trial court to submit the case to the jury and enter a judgment notwithstanding the verdict if the evidence is insufficient to support the verdict. *Phelps v. Duke Power*, 76 N.C. App. 222, 229, 332 S.E.2d 715, 719 (1985); *McMahan v. Bumgarner*, 119 N.C. App. at 237-38, 457 S.E.2d at 763-64.

Defendants argue that the record is entirely devoid of any evidence that the defendants knew or should have known of the need to restrain Mrs. Swann on 31 December 1994. We disagree. Looking at the evidence in the light most favorable to the plaintiff, Mrs. Swann had fallen at the defendant's facility on two occasions prior to the 31 December 1994 fall. In 1994 Mrs. Swann was 98 years old. The family had repeatedly requested that Mrs. Swann be restrained when she was in the lobby because of her tendency to try and stand up. In a 30

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June 1994 letter, Dr. Stewart had requested that the plaintiff be "restrained as necessary." Taken together this evidence is a sufficient basis upon which the jury could have found that the defendants were negligent in not having Mrs. Swann restrained at the time of her fall. We acknowledge that evidence supporting plaintiff's negligence claim is not overwhelming, especially in light of the fact that Len-Care is a rest home and not a nursing home; however, there is sufficient evidence to permit a jury to decide the issue. Accordingly, we reverse the trial court's directed verdict and remand for a jury trial on the negligence issue.

[2] We next consider whether the trial court erred in granting defendant's directed verdict on the plaintiff's negligent infliction of emotional distress claim.

The three elements for negligent infliction of emotional distress are: 1) the defendant negligently engaged in conduct; 2) it was reasonably foreseeable that the conduct would cause the plaintiff severe emotional distress; and 3) the conduct did, in fact, cause severe emotional distress. *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990). A physical impact or injury is not required to succeed on a claim for negligent infliction of emotional distress. However, where a defendant's negligent act has caused the plaintiff to suffer mere fright or temporary anxiety not amounting to severe emotional distress, the plaintiff may not prevail. *Id.* at 303-04, 395 S.E.2d at 97.

Plaintiff argues that because Mrs. Swann came from a very loving family and that the facility knew or should have known this fact, the failure to promptly give accurate information about the nature and extent of Mrs. Swann's injuries would cause this type of family member to suffer from severe emotional distress. In addition, plaintiff argues that even though Ms. Smith did not receive any medical treatment, she still has a claim. We disagree.

The term "severe emotional distress" means "any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Johnson*, 327 N.C. at 304, 395 S.E.2d at 97. In *Waddle v. Sparks*, the plaintiff did not see a psychiatrist after the allegedly extreme and outrageous conduct was inflicted upon her. 331 N.C. 73, 85, 414 S.E.2d 22, 28 (1992). The Supreme Court held that "there is no forecast of any medical docu-

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mentation of plaintiff's alleged severe emotional distress nor any other forecast of evidence of 'severe and disabling' psychological problems within the meaning of the test laid down in *Johnson v. Ruark*." *Id.* Summary judgment was entered for the defendant.

Ms. Smith's emotional distress does not meet the definition of severe emotional distress as defined in *Johnson and Waddle*. Ms. Smith testified that she did not go to the hospital that night, even after she was asked by Mrs. Swann's doctor if Ms. Smith would authorize life support for her grandmother. She further admitted that she had never been to see a psychiatrist, psychologist, doctor, or counselor for treatment for her alleged severe emotional distress nor had she taken any medication to ease her condition. Accordingly, this assignment of error is overruled and the trial court's entry of directed verdict is affirmed.

Affirmed in part, reversed in part and remanded.

Judge TIMMONS-GOODSON concurs.

Judge MARTIN, John C., concurs in part and dissents in part.

Judge MARTIN, John C., concurring in part and dissenting in part.

I concur with that portion of the majority opinion which affirms the entry of a directed verdict in defendant's favor with respect to Carolyn Smith's claim for negligent infliction of emotional distress. However, I must respectfully dissent from that portion of the majority opinion which reverses the entry of a directed verdict as to Annie Swann's claim for negligence.

One asserting a claim for negligence has the burden of proving that defendant breached a duty of care owed to plaintiff and that such breach was a proximate cause of plaintiff's injury. *Hubbard v. Oil Co.*, 268 N.C. 489, 151 S.E.2d 71 (1966). "Just as negligence cannot be inferred from the mere fact of injury, the negligence of one's caretaker cannot be inferred from the mere fact that the person in [his] care suffers an accidental injury." *Stacy v. Jedco Construction, Inc.*, 119 N.C. App. 115, 122, 457 S.E.2d 875, 880, *disc. review denied*, 341 N.C. 421, 461 S.E.2d 761 (1995). The evidence must be sufficient to raise more than speculation, guess, or mere possibility and, if it fails to do so, directed verdict is proper. *See Wall v. Trogdon*, 249 N.C. 747, 107 S.E.2d 757 (1959). "To hold that evidence that a defendant *could*

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have been negligent is sufficient to go to a jury, in the absence of evidence, direct or circumstantial, that such a defendant *actually was* negligent is to allow the jury to indulge in speculation and guesswork." *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 444, 186 S.E.2d 198, 203 (1972) (emphasis original) (citations omitted). The majority's holding permits the jury to engage in just the sort of "speculation and guesswork" which has been disapproved by long-established precedent.

The majority relies upon evidence that Mrs. Swann had fallen on two previous occasions during the preceding year, that the family had asked that she be restrained, and that her physician had authorized her restraint "as needed" as "a sufficient basis upon which the jury could have found that the defendants were negligent in not having Mrs. Swann restrained at the time of her fall." Following the majority's logic, defendants would have been negligent if they had not restrained Mrs. Swann at all times, which would have been contrary to her physician's orders and to his wishes as expressed during his testimony.

In my view, the evidence, even considered in the light most favorable to plaintiff, contained no showing whatsoever that on the date of Mrs. Swann's injury, defendants had reason to know that she required restraint for her own safety and, with such knowledge, failed to restrain her. In any event, the evidence tended to show that Mrs. Swann's restraint was found approximately two feet from her, giving rise to a strong inference that she had, in fact, been restrained prior to her fall and had managed to free herself, a frequent problem with the elderly according to the testimony of Mrs. Swann's physician.

In summary, plaintiffs presented essentially no evidence other than the fact that Mrs. Swann fell and was injured while in defendants' care. Defendants' negligence may not be inferred from that showing. Therefore, I vote to affirm the trial court's entry of a directed verdict in favor of defendants as to all claims.

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FAYE AND WOODY BRIGGS, MARY AND TOM CLELAND, SUE AND STEVE EDWARDS, PEGGY AND KERMIT DOTSON, RADA AND RAY GREENLAW, BONNIE AND LINDSEY HODGES, SUE AND MARTY LUKACH, FAYE AND DON MOOS, JOAN AND VANCE REECE, ANN AND CHARLIE STEWART, AND BARBARA WATKINS AND JOE WALLACE, PLAINTIFFS-APPELLANTS v. EDWARD M.G. RANKIN AND MARGARET P. RANKIN, DEFENDANTS-APPELLEES

No. COA96-1443

(Filed 7 October 1997)

1. Deeds § 74 (NCI4th)— restrictive covenant—category of home—characteristics considered

In determining the category of a home manufactured off-site to decide whether it violates subdivision restrictive covenants, the trial court should consider (1) whether the structure must comply with the N.C. Regulations for Manufactured/Mobile Homes, which are consistent with HUD national regulations, or with the N.C. State Building Code; (2) whether the structure is attached to a permanent foundation; (3) whether, after constructed, the structure can easily be moved or has to be moved like a site-built home; (4) whether title to the home is registered with the N.C. Department of Motor Vehicles or must be conveyed by a real property deed; and (5) how the structure is delivered to the homesite.

2. Deeds § 74 (NCI4th)— restrictive covenant—modular home not prohibited trailer

Defendants' modular home was not a "trailer" prohibited by a subdivision restrictive covenant where the home had to comply with the requirements of the State Building Code; defendants were required to obtain a building permit prior to placing the first two sections on the lot; the home was subject to periodic inspections by the county building inspector; the home was attached to a permanent foundation of poured concrete with load bearing brick walls and support piers; a front porch with a roof and a back deck were added to the main portion of the home; a separate site-built garage on a permanent foundation was constructed and attached to the home via a breezeway; the home can only be moved in the same way as a site-built home; and, while sections of the home were delivered by attaching a tongue and wheels to the steel frame and defendants acquired title through a bill of sale, title to the installed home must pass by way of a real property deed.

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Appeal by plaintiffs-appellants from Order entered 6 May 1996 by Judge F. Gordon Battle in Chatham County Superior Court allowing defendants-appellees' motion for summary judgment. Heard in the Court of Appeals 25 August 1997.

Barber, Bradshaw & Vernon, by Patrick E. Bradshaw and Nicolas P. Robinson, for plaintiffs-appellants.

Pulley, Watson, King & Lischer, P.A., by Richard N. Watson and Stella A. Boswell, for defendants-appellees.

WALKER, Judge.

All of the parties to this action are owners of residential lots in the Jordan Woods Subdivision in Chatham County, North Carolina. Defendants acquired title to Lot 18 in this subdivision by deed dated 13 June 1995. The deed provides that Lot 18 is subject to the Declaration of Restrictions and Easements for Jordan Woods Subdivision, recorded on 10 January 1978 in the Chatham County Registry. These restrictions, *inter alia*, prohibit the location and use of "trailers" in the subdivision.

Prior to purchasing Lot 18, defendants met with the owners of the lot as well as the attorney for the owners. At this meeting, the defendants discussed their intention of constructing a modular home on the lot and showed the owners and the attorney the plans for their home. The defendants were assured that their modular home would not violate the restrictive covenant. The defendants later learned that the owners of the adjacent lot had been permitted to build a modular home on their lot in 1987. On 14 June 1995, the defendants obtained a building permit from Chatham County for the construction of a modular home and detached garage. On 1 September 1995, installation of the defendants' modular home was begun.

On 7 September 1995, plaintiffs filed a complaint and a motion for preliminary injunction alleging that defendants had begun to construct a "trailer" in violation of the restrictive covenant. Following a hearing on the matter, the trial court entered an order dated 21 September 1995 denying plaintiff's motion for a preliminary injunction.

Both parties subsequently filed motions for summary judgment which were heard on 30 April 1996. By an order dated 6 May 1996, the trial court granted defendants' motion for summary judgment.

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At the outset, we first note that summary judgment is appropriate only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Snipes v. Jackson*, 69 N.C. App. 64, 71-72, 316 S.E.2d 657, 661, *disc. review denied and appeal dismissed*, 312 N.C. 85, 321 S.E.2d 899 (1984). Further, the trier of fact “must consider the evidence in the light most favorable to the nonmovant, and the slightest doubt as to the facts entitles him to a trial.” *Snipes*, 69 N.C. App. at 72, 316 S.E.2d at 661.

In this case, plaintiffs assign as error the trial court’s granting summary judgment for defendants and denial of plaintiffs’ motion for summary judgment because, as a matter of law, defendants’ home is a “trailer” within the meaning of the restrictive covenant. Paragraph 6 of the restrictive covenant provides in pertinent part that:

6. No structure of a temporary character, trailer . . . or any other outbuilding shall be inhabited, located or used upon any building unit or lot at any time as a residence, either temporarily or permanently.

There are two types of framing systems for modular homes—steel or wood. The defendants chose to have their home constructed with a steel framing system. Although the framing system does not change the character of the home, it does determine the available methods for moving the home to the site. By choosing a steel framing system, the defendants could have their home delivered either by being lifted onto a dolly or by attaching a tongue and wheels to its steel frame. In order to save on expenses, the defendants chose to have their home delivered by attaching a tongue and wheels to its steel frame.

After the first two sections were delivered, they were attached to a permanent foundation of poured concrete with load bearing brick walls and support piers. The home as constructed consists of three bedrooms and three baths, and is situated on a 5.6 acre lot. It has a total of 3,647 square feet, which includes 2,132 square feet of living area; a 600 square foot back deck; a 156 foot front porch; and a 759 square foot three-car garage. At various stages both during and after completion of the home, it was inspected to insure compliance with the N.C. State Building Code (the Building Code).

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This Court, in *Starr v. Thompson*, 96 N.C. App. 369, 371, 385 S.E.2d 535, 536 (1989), stated that “whether a dwelling is a mobile home under . . . a covenant depends upon its characteristics. . . .” *Id.* As the N.C. State Building Code Council has recognized, “[m]odern construction techniques are daily changing what and how America builds. Factory built components, manufactured units, and/or complete manufactured buildings are finished products ready to be marketed.” *N.C. State Bldg. Code, Volume VIII—Modular Constr. Regulations* (1994). In light of this, it is important to distinguish between “mobile homes” or “trailers” and “modular homes.”

Although this Court has stated that “whether a dwelling is a mobile home [or trailer] . . . [does not depend] . . . upon what it is called by municipal zoning authorities or others or what government agency establishes the building standards,” *Starr*, 96 N.C. App. at 371, 385 S.E.2d at 536, such information will aid us in our analysis. According to the Building Code, the terms are defined as follows:

MANUFACTURED BUILDING—A structure consisting of one or more transportable sections built and labeled within a manufacturing plant facility in accordance with the appropriate State or Federal Construction Code which governs the structure’s intended usage when erected on a building site.

MANUFACTURED HOME (Mobile Home)—A manufactured building designed to be used as a single family dwelling unit which has been constructed and labeled indicating compliance with the HUD administered National Manufactured Housing Construction and Safety Standards Act of 1974.

...

MODULAR HOME—A manufactured building designed to be used as a one or two family dwelling unit which has been constructed and labeled indicating compliance with the North Carolina State Building Code, Volume VII—Residential.

N.C. State Bldg. Code, Volume VIII—Modular Constr. Regulations (1994).

[1] In determining which category a home falls under, it is important to look at all the characteristics of the finished structure, in addition to the chosen method of delivery. Some of the characteristics to consider include: (1) whether the structure must comply with the N.C. Regulations for Manufactured/Mobile Homes, which are consistent

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with Housing and Urban Development (HUD) national regulations, or with the Building Code; (2) whether the structure is attached to a permanent foundation; (3) whether, after constructed, the structure can easily be moved or has to be moved like a site-built home; (4) whether title to the home is registered with the N.C. Department of Motor Vehicles or title must be conveyed by a real property deed; and, (5) how the structure is delivered to the homesite.

Plaintiffs rely on this Court's recent ruling in *Young v. Lomax*, 122 N.C. App. 385, 470 S.E.2d 80 (1996). The plaintiffs in *Young* were owners of residential lots in Cabarrus County and sought to enjoin defendant from placing a mobile home on a lot in the subdivision in violation of the subdivision's restrictive covenants. Once the home reached its destination, "the wheels and axles were removed and the structure was placed on concrete blocks which were stacked to create piers." *Id.* at 388, 470 S.E.2d at 82. In upholding the summary judgment for plaintiffs, the Court stated that:

Here, defendants admitted that the structure was delivered to the site in two sections; each section had its own permanent steel chassis consisting of two "I" beams affixed to the flooring system of the unit; each unit was attached to four axles with two wheels per axle; and a truck towed the structure to its present site with the structure riding on its own axles and wheels. We conclude that this evidence established as a matter of law that the structure is a mobile home.

Id. at 387-388, 470 S.E.2d at 82.

The *Young* court cited with approval *Starr* in support of its ruling. The plaintiffs in *Starr* contended that the structure on defendant's lot was a "mobile home" in violation of a restrictive covenant. The structure involved consisted of two sections which were 8 feet wide and 40 feet long, for a total square footage of approximately 640 square feet. *Starr*, 96 N.C. App. at 371, 385 S.E.2d at 536. Further, once the wheels and tongues were removed from the sections, they were placed on footings, leading the court to observe that the structure "cannot be distinguished from double-wide mobile home sections that are to be seen daily on the lots of mobile home dealers and rolling down the highways of the state." *Id.* The court held that:

[A] factory built dwelling, such as the one involved, designed and constructed to travel on wheels from place to place is a "mobile home" within the meaning of a covenant against such structures

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as a matter of law, even though the axles, wheels and tongues were removed after the structure was placed on the lot.

Id. at 371-372, 385 S.E.2d at 536-537 (citing *City of Asheboro v. Auman*, 26 N.C. App. 87, 214 S.E.2d 621, *cert. denied*, 288 N.C. 239, 217 S.E.2d 663 (1975)).

[2] The present case is distinguishable from both the *Young* and *Starr* cases. First, the defendants' home had to comply with the requirements of the Building Code, and, as such, they were required to obtain a building permit prior to placing the first two sections on the property. Further, this home was subject to periodic inspections by the county's building inspector. *See N. C. State Bldg. Code, Volume VII—Residential*, §112 (1997).

Next, since the home was subject to the Building Code, it had to be attached to a permanent foundation. *See N. C. State Bldg. Code, Volume VII—Residential*, §401 (1997). As noted earlier, after delivery, the first two sections were attached to a permanent foundation of poured concrete with load bearing brick walls and support piers. Later, a front porch with a roof and a back deck were added to the main portion of the home. Finally, a separate site-built, three-car garage on a permanent foundation was constructed and attached to the home via a breezeway. Neither the *Young* nor the *Starr* cases mentioned whether the structures involved were attached to a permanent foundation.

Further, since the defendants' home is attached to a permanent foundation, it can only be moved in the same way as a site-built home. In a similar case, *Angel v. Truitt*, 108 N.C. App. 679, 424 S.E.2d 660 (1993), the plaintiffs brought suit to enforce a restrictive covenant prohibiting the placement of mobile homes within their subdivision. In affirming the trial court's summary judgment for defendants, this Court held that:

Once lifted off the dolly by crane and placed on a permanent foundation, they can be moved only in the manner in which site-built homes are moved. The affidavits of professional house movers reveal that in order to move the structure the modules are not separated and placed back on the dolly, but are moved as one unit in exactly the same manner that a house built on-site is moved. Therefore, the structure at issue is not a "mobile home" within the meaning of the restrictive covenant.

Angel, 108 N.C. App. at 683-684, 424 S.E.2d at 663.

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And finally, while the defendants acquired title to their home through a bill of sale, once installed, title to their home must pass by way of a real property deed. In contrast, title to a “mobile home” or “trailer” passes by transfer of a manufacturer’s certificate of origin and carries with it a normal motor vehicle title obtained from the N.C. Department of Motor Vehicles. *See* N.C. Gen. Stat. § 20-4.01(23) (1993); N.C. Gen. Stat. § 20-50 (Cum. Supp. 1996).

For the reasons set forth above, the defendants’ home is not a “trailer” within the meaning of the restrictive covenant. Accordingly, the trial court properly granted summary judgment in favor of defendants.

Affirmed.

Chief Judge ARNOLD and Judge McGEE concur.

BETTY JEAN PRYOR AND RUTHIE PRYOR, AS GUARDIAN AD LITEM FOR CORRY L. PRYOR, MINOR, PLAINTIFFS V. DAVID F. MERTEN, SAUNDRA SHUMATE, AND JANE DOE, DEFENDANTS

No. COA96-1483

(Filed 7 October 1997)

1. Judgments § 224 (NCI4th)— discharged attorney—quantum meruit fee claim—not barred by res judicata

A discharged attorney’s quantum meruit claim for a portion of the contingent fee collected by the attorney who settled a personal injury case was not barred by res judicata since the discharged attorney was neither a party to the lawsuit nor in privity with one of the parties; he was not given notice of the settlement or given an opportunity to be heard with respect to his quantum meruit interests; and the quantum meruit issue has never been litigated.

2. Attorneys at Law § 62 (NCI4th)— discharged attorney—quantum meruit fee claim against settling attorney

An attorney who, before being discharged, performed significant services for clients in a contingent fee relationship in a personal injury action may recover quantum meruit attorney fees from the settling attorney by a motion in the cause. To require the

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discharged attorney to proceed against his former clients would unfairly require them to pay attorney fees in excess of the contingency fee to which they agreed.

3. Attorneys at Law § 62 (NCI4th)— discharged attorney— quantum meruit fee claim—not barred by laches

A discharged attorney's quantum meruit claim to recover a portion of the contingent fee received by the settling attorney in a personal injury action was not barred by laches where the discharged attorney filed his claim only weeks after the settlement and only one week after he learned of the settlement; the discharged attorney did not have a statutory right to intervene in the case; the filing of an attorney's lien before the settlement would have been premature; and the settling attorney was not prejudiced by any delay.

Appeal from order entered 26 March 1996 and reconsidered 25 June 1996 by Judge F. Gordon Battle in Orange County Superior Court. Heard in the Court of Appeals 26 August 1997.

This action involves a dispute over distribution of attorney's fees. The underlying action here arose from an injury to the minor plaintiff that occurred on 13 September 1991. To represent them the plaintiffs hired attorney Pamela Hunter, who associated appellant Lawrence U. Davidson, III, to assist in the case. In September 1992, plaintiffs terminated Hunter and Davidson, and hired attorney Chris M. Clemens of the Wisconsin Bar to pursue their claim. On 9 September 1994, Clemens associated the Law Offices of Grover C. McCain, Jr. to serve as local counsel. Appellee William R. Hamilton, an attorney in the McCain law offices, filed suit on behalf of plaintiffs against defendants on 12 September 1994. Hamilton filed an amended complaint on 25 October 1994.

On 13 February 1995, Hamilton received a settlement offer from defendants for \$250,000. Hamilton communicated this offer to plaintiffs, who authorized Hamilton to accept the offer on 18 February 1995. On 20 February 1995, plaintiffs changed their mind and informed Hamilton of their decision to reject the offer. On 24 February 1995, plaintiffs terminated "all the lawyers associated with the Corry Pryor case" by facsimile to attorney Clemens in Wisconsin. Attorney Davidson was rehired by plaintiffs and was substituted as counsel of record.

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On 10 March 1995, Hamilton provided Davidson with medical records and copies of files and advised him in writing that McCain Law Offices had incurred out-of-pocket expenses of \$3,119.19 in pursuance of the claim. Hamilton asserted at the hearing on his "Motion in the Cause" that he also orally notified Davidson of their desire to protect their quantum meruit interests, and orally asked Davidson and David Ward, attorney for defendants, to notify him in the event a settlement was reached.

On 6 February 1996, a settlement was reached. During a settlement hearing, the court approved the settlement, the distribution of attorney's fees, and payment of expenses. The hearing did not address any quantum meruit interest that Hamilton may have had, nor did Davidson notify the court that \$3,119.19 of the requested expenses were for Hamilton. The lawsuit was voluntarily dismissed with prejudice and the file was sealed. On 22 February 1996, Davidson mailed a check to Hamilton for \$3,119.19 for his out-of-pocket expenses.

On 29 February 1996, Hamilton filed his "Motion in the Cause" seeking award of quantum meruit attorney fees. After a hearing on 25 March 1996, the trial court awarded Hamilton and the Law Offices of Grover C. McCain, Jr. \$20,000 of the \$91,666 contingent fee collected by Davidson. Davidson filed a Motion for Reconsideration and a Motion for a More Specific Order on 1 April 1996. Both motions were denied 3 June 1996. Davidson appealed.

Lawrence U. Davidson, III, for appellant.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr. and William R. Hamilton, for defendant-appellees.

EAGLES, Judge.

[1] Appellant argues that the trial court did not retain jurisdiction to hear the quantum meruit proceedings and that appellee's claim was barred by res judicata. The case at bar was dismissed with prejudice by the plaintiffs pursuant to the settlement agreement. Davidson argues that a dismissal with prejudice gives rise to the doctrine of res judicata, and is effective not only as to the immediate parties, but also as to their privies. *Johnson v. Bolinger*, 86 N.C. App. 1, 8, 356 S.E.2d 378, 383 (1987) (citing 9 Wright & Miller, Federal Practice and Procedure, § 2367, p. 185-86 (1971)). Davidson accordingly contends

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that res judicata deprived the trial court of jurisdiction and is a bar to further action. Hamilton asserts that res judicata does not apply because he was not a party in the underlying case, and he was never given notice of the minor's settlement hearing or an opportunity to be heard. Accordingly, Hamilton contends that his claim has never been litigated. See *Batch v. Town of Chapel Hill*, 326 N.C. 1, 387 S.E.2d 655 (1990).

"The essential elements of res judicata are: '(1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits.' " *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 135, 337 S.E.2d 477, 482 (1985) (quoting *Hogan v. Cone Mills Corp.*, 63 N.C. App. 439, 442, 305 S.E.2d 213, 215 (1983)).

Res judicata does not bar Hamilton's action. Hamilton was neither a party to the lawsuit nor in privity with one of the parties. He was not given notice of the settlement, nor given an opportunity to be heard with respect to his quantum meruit interests. Accordingly, the issue has never been litigated and res judicata is not a bar to further action.

[2] We next consider whether Hamilton's claim for quantum meruit attorney's fees must be asserted in a separate civil suit against his former client rather than against Davidson by motion in this cause. Davidson argues that because Hamilton had been discharged from the case prior to final judgment, Hamilton's right to the judgment was limited to the \$3,119.19 actually advanced on behalf of his clients, which was paid. Davidson contends that after Hamilton was fired, Hamilton could proceed in a quantum meruit action only against his former clients for attorney's fees. Davidson relies on *Mack v. Moore*, 107 N.C. App. 87, 418 S.E.2d 685 (1992) (citing *Covington v. Rhodes*, 38 N.C. App. 61, 247 S.E.2d 305 (1978), *disc. rev. denied*, 296 N.C. 410, 251 S.E.2d 468 (1979)).

Hamilton argues that he performed a significant amount of work in the underlying case and is entitled to a quantum meruit recovery. However, he asserts that it would be unjust to have more than the one-third contingency fee, already paid, taxed against the handicapped minor child and his family. Hamilton also argues that it would be unfair to allow unjust enrichment of Davidson by allowing him to retain the entire fee, when Davidson was not the sole force in obtaining a settlement.

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North Carolina has not addressed the issue of whether an attorney, who before being discharged performed significant services for a client in a contingent fee relationship, may recover from the settling attorney in quantum meruit. Other courts have addressed and resolved the issue. *Joye v. Heuer*, 813 F.Supp. 1171 (D.S.C. 1993) (court approved of a quantum meruit distribution of the fees among the attorneys in direct proportion to the hours worked in the case); *see also Potts v. Mitchell*, 410 F.Supp. 1278 (W.D.N.C. 1976) (discharged attorney's quantum meruit recovery was granted from funds being held as the contingency fee). We find these federal decisions persuasive and accordingly we conclude the trial court properly allowed the quantum meruit action by Hamilton to proceed. To require Hamilton to proceed against party plaintiffs would unfairly require plaintiffs to pay attorney's fees in excess of the one-third contingency fee to which they agreed. *See Covington*, 38 N.C. App. at 65, 247 S.E.2d at 308. We believe the more equitable result is to allow the discharged attorney to proceed against the new attorney for the prior attorney's rightful share of the total attorney's fees. Accordingly, this assignment of error is overruled.

[3] Davidson argues next that Hamilton should be equitably estopped from raising the quantum meruit action and that Hamilton's claim is barred by laches. Davidson claims that Hamilton unjustly delayed in giving notice of his equitable claim and that he relied to his detriment on Hamilton's failure to make the claim known. Davidson notes that when Hamilton sent his letter outlining his costs, he made no mention of a claim for attorney's fees. Davidson argues that he reasonably relied on the letter when he petitioned the court for costs. Davidson also argues that Hamilton did not give notice of his intentions by intervening during the course of litigation. Davidson finally argues that the amount of Hamilton's fee should be determined independently of what Davidson was awarded as attorney's fees, because it would be unfair to adjust Davidson's award to accommodate Hamilton's fee. We are not persuaded.

"The defense of laches will bar a claim when the plaintiff's delay in seeking a known remedy or right has resulted in a change of condition which would make it unjust to allow the plaintiff to prosecute the claim." *Cieszko v. Clark*, 92 N.C. App. 290, 297, 374 S.E.2d 456, 460 (1988). "The doctrine of laches, however, is not based upon mere passage of time; it will not bar a claim unless the delay is (i) unreasonable and (ii) injurious or prejudicial to the party asserting the defense." *Id* (citing *Taylor v. City of Raleigh*, 290 N.C. 608, 461 S.E.2d 576 (1976)).

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Hamilton is not barred by laches from seeking quantum meruit recovery. First, he did not have a statutory right to intervene. G.S. 1A-1, Rule 24; *Howell v. Howell*, 89 N.C. App. 115, 365 S.E.2d 181 (1988). Second, Hamilton could not file for an attorney's lien before the settlement hearing because such a filing would have been premature. "A charging lien is not available until there is a final judgment or decree to which the lien can attach." *Id.* at 117, 365 S.E.2d at 183 (citing *Dillon v. Consolidated Delivery, Inc.*, 43 N.C. App. 395, 258 S.E.2d 829 (1979); *Covington*, 38 N.C. App. at 61, 247 S.E.2d at 305.). Third, Hamilton asserts that he gave oral notice of his quantum meruit interest to Davidson, and filed his claim only weeks after the settlement conference, and only one week after he learned of the settlement. Hamilton's delay was reasonable under the circumstances. Finally, Davidson has shown no prejudice from any purported delay by Hamilton in filing the motion in the cause. See *Harris & Gurganus, Inc. v. Williams*, 37 N.C. App. 585, 246 S.E. 2d 791 (1978). Accordingly, Hamilton's claim is not barred by laches.

The order granting a quantum meruit award of attorney's fees is affirmed.

Affirmed.

Judges MARTIN, John C., and TIMMONS-GOODSON concur.

WILLIE T. GLOVER, PLAINTIFF v. ANNIE G. FARMER, RUTH FARMER, AND
CUYLER M. FARMER, DEFENDANTS

No. COA96-1194

(Filed 7 October 1997)

**Process and Service § 107 (NCI4th)— service of process on
visiting adult daughter—sufficient**

The trial court erred in a negligence action arising from an automobile accident by concluding that service of process on defendants was insufficient where the deputy sheriff served defendants by giving the summons and complaint to their adult daughter, who was staying with them during a week-long visit. Whether a person is a resident of a particular place is not determined by any given formula, but rather depends significantly on

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the facts and circumstances surrounding the particular issue. The requirement of N.C.G.S. § 1A-1, Rule 4(j)(1)(a) that a summons and complaint be served on "some person of suitable age and discretion then residing therein . . ." is broad enough to include an adult daughter staying with her parents during her visit that week. Furthermore, upon inquiry by the deputy sheriff, defendants' daughter stated that she resided at her parents' home, thus indicating that she considered herself to be residing at her parents' home at that time.

Appeal by plaintiff from orders entered 12 March and 2 April 1996 by Judge E. Lynn Johnson in Wake County Superior Court. Heard in the Court of Appeals 18 August 1997.

Amos E. Link, Jr. for plaintiff-appellant.

Bailey & Dixon, L.L.P., by Kenyann G. Brown, for defendant-appellees.

WALKER, Judge.

Plaintiff filed a negligence action against defendants on 27 July 1994, seeking damages for injuries sustained as a result of an automobile accident which occurred on 14 December 1992. The summonses were returned indicating both defendants Annie G. Ruth Farmer and Cuyler M. Farmer (Note: Annie G. Farmer and Ruth Farmer are the same person) were served on 10 August 1994 "by leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein." The summonses further indicated the person with whom the copies were left was "Kimberly Zino, 2835 Tilghman Road, Wilson, N.C." Both summonses were served by Deputy Sheriff Louise Morton of the Wilson County Sheriff's Department.

On 10 October 1994, defendants filed an answer which, among other defenses, alleged insufficient service of process and lack of personal jurisdiction. However, no affidavits in support of this allegation were filed at that time. On 16 January 1996, the defendants filed a motion to dismiss along with the affidavits of defendant Annie Ruth Gardner Farmer and Kimberly Zino, daughter of the defendants.

These affidavits tended to show the following: both defendants lived at 2835 Tilghman Road, Wilson, North Carolina on 10 August

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1994; defendants were away from home on said date; defendants' daughter, Kimberly Zino, was visiting with them for one week, but that she was a resident of South Carolina on 10 August 1994.

In response to the motion, plaintiff filed the affidavit of Deputy Sheriff Louise Morton. Deputy Morton stated that she went to 2835 Tilghman Road, Wilson, North Carolina on 10 August 1994 to serve the summonses and complaint on each of the defendants. As she approached the residence, she was met by Kimberly Zino who indicated to the deputy that she resided at 2835 Tilghman Road. Further, Deputy Morton stated that she would not have served the summonses on Ms. Zino had she been advised by Ms. Zino that she did not reside at the Tilghman Road residence.

The matter was heard on 19 February 1996 and the trial court granted defendants' motion to dismiss plaintiff's claim on the basis of insufficient service of process and lack of personal jurisdiction.

The issue on appeal is whether the trial court committed reversible error in dismissing plaintiff's claim for lack of personal jurisdiction over the defendants for insufficient service of process.

It is well established that a court may obtain personal jurisdiction over a defendant only by the issuance of summons and service of process by one of the statutorily specified methods. *See Roshelli v. Sperry*, 57 N.C. App. 305, 291 S.E.2d 355 (1982). Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed. *Sink v. Easter*, 284 N.C. 555, 561, 202 S.E.2d 138, 143 (1974).

N.C. Gen. Stat. § 1A-1, Rule 4 (j)(1)(a) (1996 Cum. Supp.) provides that a natural person may be served as follows:

By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion *then residing therein*; . . .

(emphasis added.)

Defendants argue that Ms. Zino was a resident of South Carolina and was only visiting her parents' home during the week of 10 August 1994. Therefore, Ms. Zino was not residing in the defendants' home and plaintiff's attempt at service of process by delivering the summonses and complaint to her was clearly insufficient to afford personal jurisdiction over defendants. Defendants further assert that it is

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irrelevant that Deputy Morton testified through her affidavit that she was informed by Ms. Zino that she was a resident of 2835 Tilghman Road.

On the other hand, plaintiff contends there is no evidence contradicting Deputy Morton's affidavit and that there was no practical manner in which Deputy Morton could have ascertained that Ms. Zino did not reside at the defendants' address other than inquiring of her, which the deputy did. Further, plaintiff contends that defendants should be estopped from asserting their objection to insufficiency of process and lack of personal jurisdiction as this case had proceeded with depositions, a mediation conference, and was scheduled for trial in the Wake County Superior Court on 25 September 1995. However, the trial was continued.

Our Supreme Court, with Justice Ervin writing for the Court, in trying to determine where the defendant resided, stated:

It was well said by the late Justice Oliver Wendell Holmes that 'a word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used.' This aphorism finds abundant exemplification in the word 'residence,' which has many shades of meaning, ranging all the way from mere temporary presence to the most temporary abode. 'Residence' is sometimes synonymous with 'domicile.' But when these words are accurately and precisely used, they are not convertible terms. 'Residence' simply indicates a person's actual place of abode, whether permanent or temporary; 'domicile' denotes a person's permanent dwelling-place, to which, when absent, he has the intention of returning. Hence, a person may have his residence in one place, and his domicile in another. (citations omitted.)

Sheffield, et al. v. Walker, et al., 231 N.C. 556, 559, 58 S.E.2d 356, 359 (1950). See also, *Davis v. Maryland Casualty Company*, 76 N.C. App. 102, 331 S.E.2d 744 (1985); *Burke v. Harrington*, 35 N.C. App. 558, 241 S.E.2d 715 (1978). Thus, whether a person is a resident of a particular place is not determined by any given formula, but rather depends significantly on the facts and circumstances surrounding the particular issue.

Here, Ms. Zino received copies of the summonses and complaint from Deputy Morton after she responded that she resided at 2835

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Tilghman Road, her parents' address. Ms. Zino was in fact staying with her parents during this time.

In the case of *M. Lowenstein & Sons, Inc. v. Austin*, 430 F. Supp. 844 (S.D.N.Y. 1977), a United States Marshall served the summons and complaint on the defendant's 21-year-old daughter at the undisputed residence of the defendant in Myrtle Beach, South Carolina. *Id.* at 845. Defendant argued that service was insufficient because his daughter was at his residence visiting from school in Memphis, Tennessee, and thus, she was not a person "then residing" at his residence. *Id.* The court rejected the defendant's reasoning and held that "Rule 4(d)(1) is broad enough to include a student returning home from college to stay at least overnight at her parents' residence" and that personal jurisdiction was obtained over the defendant. *Id.*

The facts of our case are similar to those found in *Lowenstein*. Further, Rule 4(d)(1) of the Federal Rules of Civil Procedure (in pertinent part) contains the same language as does our Rule 4(j)(1)(a) at issue in the instant case. Thus, we conclude the requirement of Rule 4(j)(1)(a) that the summons and complaint be served on "some person of suitable age and discretion then residing therein . . ." is broad enough to include an adult daughter staying with her parents during her visit that week. Therefore, the trial court erred in concluding that Ms. Zino did not reside in defendants' home within the meaning of N.C. Gen. Stat. § 1A-1, Rule 4 (j)(1)(a). *See Bowers v. Billings*, 80 N.C. App. 330, 342 S.E.2d 58 (1986) (Rules of civil procedure should be construed liberally and practically).

Further, Ms. Zino's response to Deputy Morton's inquiry that she resided at defendants' home is also an indication that Ms. Zino considered herself to be residing at her parents' home at this time.

We hold that service of process on each of the defendants complied with the requirements of Rule 4 (j)(1)(a) and the trial court erred in concluding otherwise. The order dismissing plaintiff's claim against both defendants is

Reversed.

Chief Judge ARNOLD and Judge SMITH concur.

VANCE CONSTRUCTION CO. v. DUANE WHITE LAND CORP.

[127 N.C. App. 493 (1997)]

VANCE CONSTRUCTION COMPANY, INC., PLAINTIFF V. DUANE WHITE LAND CORPORATION, DEFENDANT AND EATON FERRY MARINA, INC., INTERVENOR

No. COA96-1504

(Filed 7 October 1997)

Judges, Justices, and Magistrates § 6 (NCI4th)— Rule 60 motion for relief—judge in different county and district—no commission—no jurisdiction

A superior court judge lacked jurisdiction to grant plaintiff's Rule 60 motion for relief from a judgment rendered in Warren County Superior Court arising from the construction of a boat storage facility where the Rule 60 motion was heard in Edgecombe County Superior Court and the judge held no commission from the Chief Justice or other authorization to hold a session of superior court in Warren County or District 9 during the week the motion was heard. Although the parties consented to having the motion heard in Edgecombe County, subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel and the order entered is void.

Appeal by defendant and intervenor from order entered 25 October 1996 by Judge Frank R. Brown in Edgecombe County Superior Court. Heard in the Court of Appeals 27 August 1997.

Banzet, Banzet & Thompson, by Lewis A. Thompson, III, for defendant/intervenor appellant.

Zollicoffer & Long, by Nicholas Long, Jr., for plaintiff appellee.

SMITH, Judge.

In February of 1990, Vance Construction Company, Inc. ("plaintiff"), agreed to build a boat storage facility for Duane White Land Corporation, predecessor to Eaton Ferry Marina, Inc. (collectively "defendant"). Plaintiff subsequently filed this action in Warren County Superior Court seeking to recover the balance due from defendant for the construction of the boat storage facility. Defendant counterclaimed for damages as a result of defects in the facility's construction. On 3 June 1994, the trial court, with Judge Frank R. Brown presiding, entered judgment awarding plaintiff \$41,863.67 with interest for the construction of the facility and \$15,839.05 with interest for repairs to the sales and service center building, and

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also awarding defendant \$12,238.00 with interest for defects in the facility's construction.

Prior to the entry of judgment, defendant contacted Varco-Pruden Buildings, Inc. ("Varco-Pruden"). Varco-Pruden, a division of United Dominion Industries, Inc. ("United Dominion"), was a subcontractor for plaintiff and had supplied the metal building components plaintiff used in the construction of the facility for defendant. On 19 April 1994, defendant and Varco-Pruden entered into a settlement agreement providing that Varco-Pruden would pay defendant \$13,900.00 for "problems [that] arose with the materials that were used in the construction of the storage facility" On or about 19 May 1995, United Dominion paid defendant \$13,400.00 as payment in full for all claims by defendant against United Dominion and Varco-Pruden arising out of the defects in the materials used in the facility's construction.

The trial court's June 1994 judgment was later affirmed by this Court in *Vance Construction Co. v. Duane White Land Corp.*, 120 N.C. App. 401, 462 S.E.2d 814 (1995). On 8 November 1995, plaintiff and defendant entered into a consent order allowing payment which authorized the release to plaintiff of \$62,574.40 plus \$100.48 in court costs, such funds being held by the Warren County Clerk of Court as a cash bond paid by defendant. Plaintiff subsequently filed a motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(5) (1990), alleging it was entitled to a credit against the amount awarded to defendant on its counterclaim as a result of United Dominion's payment of \$13,400.00 to defendant for the defective building materials. Plaintiff's motion was heard after notice and by consent at the 23 September 1996 term of Edgecombe County Superior Court, Judge Frank R. Brown presiding. Judge Brown granted plaintiff's motion for relief on 25 October 1996.

On appeal, defendant contends the trial court erred by granting plaintiff's motion for relief. However, we do not reach this issue, since Judge Brown did not have jurisdiction to hear or grant plaintiff's motion, and his 25 October 1996 order is therefore vacated.

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (1990). An objection to subject matter jurisdiction may be made at any time during the course of the action. *Turner v. Hatchett*, 104 N.C. App. 487, 488, 409 S.E.2d 747, 748 (1991) (citations omitted).

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N.C. Const. Art. IV, § 11 provides that “[t]he Chief Justice of the Supreme Court, acting in accordance with rules of the Supreme Court, shall make assignments of Judges of the Superior Court and may transfer District Judges from one district to another for temporary or specialized duty.” We take judicial notice of the fact that the Chief Justice of the North Carolina Supreme Court by order assigns resident or regular judges of the superior courts to various counties or judicial districts as they appear on the master calendar or by a separate commission. According to N.C. Gen Stat. § 7A-47 (1995),

[a] regular superior court judge, duly assigned to hold the courts of a county, or holding such courts by exchange, shall have the same powers in the district or set of districts as defined in G.S. 7A-41.1(a) in which that county is located, in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district or set of districts as defined in G.S. 7A-41.1(a) has

In addition, “[i]n any case in which the superior court in vacation has jurisdiction, and all the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or during a session of court, at their election.” N.C. Gen. Stat. § 7A-47.1 (1995). However, the jurisdiction of a superior court judge is ordinarily limited to the district to which he is assigned or resides. *Baker v. Varser*, 239 N.C. 180, 188, 79 S.E.2d 757, 763 (1954).

“[W]e note *ex mero motu* that we may take judicial notice of the assignments of trial judges to hold court, of the counties that make up a certain district and of the resident district of a superior court judge.” *Turner*, 104 N.C. App. at 489, 409 S.E.2d at 748 (quoting *State v. Sauls*, 299 N.C. 319, 324, 261 S.E.2d 839, 842 (1980)). We therefore take judicial notice of the following: During September of 1996, Judge Brown was assigned to District 7BC, which included Edgecombe County. At that time he was not assigned to hold any session of superior court in Warren County, located in District 9. The instant case had not been designated as exceptional with Judge Brown assigned to hear the same pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts. Because Judge Brown had no commission from the Chief Justice or other authorization to hold a session of superior court in Warren County or District 9 during the week plaintiff’s motion was heard, the order entered is void. See *Baker*, 239 N.C. at 185, 79 S.E.2d at 761. It is irrelevant that the parties consented to the motion being heard in Edgecombe County, as

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[127 N.C. App. 496 (1997)]

subject matter jurisdiction “‘cannot be conferred upon a court by consent, waiver, or estoppel.’” *Deep River Citizens Coalition v. N.C. Dept. of E.H.N.R.*, 119 N.C. App. 232, 235, 457 S.E.2d 772, 774 (1995) (quoting *State v. Earley*, 24 N.C. App. 387, 389, 210 S.E.2d 541, 543 (1975)).

For the above reasons, the order granting plaintiff’s motion for relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(5) is vacated and the case is remanded to the Warren County Superior Court. In the event of a rehearing, we recommend the trial court make additional findings regarding plaintiff’s knowledge, if any, of United Dominion’s payment to defendant at the time it entered the consent order with defendant.

Vacated and remanded.

Judges LEWIS and JOHN concur.

THOMAS ALLEN BRUTON, PLAINTIFF V. NORTH CAROLINA FARM BUREAU
MUTUAL INSURANCE COMPANY, DEFENDANT

No. COA96-1490

(Filed 7 October 1997)

1. Insurance § 1186 (NCI4th)— underinsured motorist coverage—residency—family visits

The trial court did not err in a declaratory judgment action to determine coverage under an underinsured motorist policy issued to plaintiff’s father by finding that plaintiff was not a “resident” of his father’s household where the undisputed facts showed that plaintiff spent the majority of his time in his mobile home in Faison; his Faison address was used for his bank account, utility bills, tax matters, medical and accident reports, and was listed as his “residence” with the post office. The two or three weekends per month plaintiff spent at his father’s house could be characterized, at most, as family visits and did not make plaintiff a “resident” of his father’s house for the purposes of recovering underinsured motorist coverage.

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2. Insurance § 1165 (NCI4th)— underinsured motorist coverage—listed driver—not resident of household

In a declaratory judgment action to determine underinsured motorist coverage, there was no merit to plaintiff's argument that he had a reasonable expectation of coverage under his father's policy because his name was listed on the declarations page as a driver. The language of the policy was unambiguous and required that a family member for purposes of coverage must be a resident of the household; the trial court properly found that plaintiff was not a resident of the insured's household.

Appeal by plaintiff from judgment entered 12 September 1996 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 27 August 1997.

Mast, Schulz, Mast, Mills & Stem, P.A., by Charles D. Mast and Bradley N. Schulz, for plaintiff-appellant.

Crossley, McIntosh, Prior & Collier, by Clay A. Collier, for defendant-appellee.

LEWIS, Judge.

In this appeal, we are called upon to decide whether, within the context of an insurance policy, plaintiff was a "resident" of his father's household at the time of his injury by automobile accident on 31 October 1992.

Plaintiff was injured when the car in which he was riding, driven by his girlfriend, swerved off the road and hit a tree. Plaintiff incurred expenses of \$125,000 as a result. He collected the policy limit of \$25,000 from his girlfriend's liability carrier. He now seeks to collect the remaining \$100,000 under his father's policy, which provides up to \$300,000 in underinsured motorist (UIM) coverage to any "family member." The policy defines "family member" as "a person related to you [the insured] by blood, marriage or adoption *who is a resident of your household*" (emphasis added). The policy, however, does not define "resident." Whether plaintiff can recover under his father's UIM coverage hinges on whether plaintiff was a "resident" of his father's household at the time of the accident.

In a declaratory judgment action instituted by plaintiff the trial judge, sitting without a jury, found that plaintiff was not a "resident" of his father's household and was not covered under his father's policy. Plaintiff appeals.

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[1] The meaning of language used in an insurance policy is a question of law for this Court, as is the construction and application of the policy's provisions to the undisputed facts. *Daniel v. City of Morganton*, 125 N.C. App. 47, 53, 479 S.E.2d 263, 267 (1997). As with any other question of law, our review is de novo. *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996), *disc. review denied*, 346 N.C. 275, 487 S.E.2d 538 (1997).

The word "resident" is an elastic, flexible, and somewhat ambiguous term. *Great American Ins. Co. v. Allstate Ins. Co.*, 78 N.C. App. 653, 656, 338 S.E.2d 145, 147, *disc. review denied*, 316 N.C. 552, 344 S.E.2d 7 (1986). Its meaning can fall anywhere within the spectrum of "a place of abode for more than a temporary period of time" to "a permanent and established home." *Id.*

We conclude that a reasonable construction of the term "resident" does not include plaintiff based on the facts before us. We find that plaintiff was not a resident of his father's household at the time of the accident. The undisputed facts show that plaintiff spent the majority of his time with his girlfriend in *his* mobile home in Faison; prior to the accident he purchased a health insurance policy for which he listed his Faison address; he listed his Faison address for a bank account; his utility bills were incurred at and mailed to his Faison address; his Faison address was given for all tax matters; and his Faison address was also listed as his "residence" with the United States Post Office. In addition, following the accident plaintiff gave his Faison address to the medical authorities for all of his medical and accident reports. Although plaintiff spent two to three weekends per month at his father's house and stored some toiletries there, the overwhelming evidence shows that he consistently and publicly represented his Faison address as his residence. At most, plaintiff's occasional weekend visits could be characterized as family visits.

We affirm the trial court's judgment that plaintiff was not a resident under his father's automobile insurance policy for the purposes of recovering underinsured motorist coverage.

[2] Plaintiff also argues that he was covered under his father's policy because he had a reasonable expectation of coverage because his name was listed on the declarations page of the insurance policy as a driver. We disagree.

Plaintiff advances his "reasonable expectation of the parties" theory in an effort to evade the express language of the insurance con-

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tract. Insurance contracts are strictly construed absent any ambiguity. *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794 (1986). The language of the insurance policy here is unambiguous. A family member for purposes of coverage under the insurance policy means “a person related to you by blood, marriage or adoption who is a *resident* of your household” (emphasis added). The trial court found, as do we, that plaintiff was not a resident of the named insured’s (his father’s) household. Therefore, by the terms of the contract plaintiff is not covered. We discern no reason to depart from the terms of the policy.

Accordingly, the trial court’s judgment is affirmed.

Affirmed.

Judges JOHN and SMITH concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. RICHARD C. HAGGERTY, JR.,
DEFENDANTS

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. MARILYN A. MCINTOSH, INDIVIDUALLY AND AS CUSTODIAN FOR BONNIE MCINTOSH AND BETSY MCINTOSH; BONNIE MCINTOSH; BETSY MCINTOSH; AND ALEXANDER MCINTOSH, DEFENDANTS

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. HOWARD FRANKLIN WILLARD, JR. AND WIFE, VIVIAN WILLARD, DEFENDANTS

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. WILLIAM F. STEVENS AND WIFE, NANCY J. STEVENS; EUGENE W. PURDOM, TRUSTEE; AND SOUTHERN NATIONAL BANK OF NORTH CAROLINA, DEFENDANTS

No. COA96-1303

(Filed 7 October 1997)

Highways, Streets, and Roads § 1 (NCI4th)— width of right-of-way—unrecorded plat—referenced in deeds

The trial court did not err by ruling that DOT had existing rights-of-way 50 feet from the center of each side of Wendover Avenue rather than the 30 feet claimed by defendants where defendants’ deeds referred to unrecorded plats that showed the 100-foot right-of-way; defendants allowed public utilities, without

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easements, to place utility poles on defendants' land more than 30 feet from the center of Wendover Avenue; the State placed concrete right of way monuments on the properties in 1940 at 50 feet from the center line; and defendants were not paying ad valorem taxes on the land within the 100-foot right-of-way. Once the landowner has notice of the plat through his deed, the plat does not have to be recorded to effect a right-of-way dedication, and the dedication becomes irrevocable once it has taken place, is open to the public and at least part of the area is maintained.

Appeal by defendants from order entered 25 July 1996 by Judge Howard R. Greeson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 26 August 1997.

This is a joint appeal by four defendants who own tracts of real property abutting Wendover Avenue in Guilford County. In July 1993, the Department of Transportation (DOT) filed separate condemnation actions against each of the defendants. In each action, DOT claimed that the parcel it sought to condemn was subject to an existing 100 foot right of way. In their answers, the defendants claimed the right of way was only 60 feet, or 30 feet from the center on each side of Wendover Avenue. After a hearing, the trial court entered an order on 25 July 1996 concluding that the existing right of way was 100 feet, or 50 feet from the centerline of Wendover Avenue.

After 1929, the State Highway Commission had been claiming a 60 foot right of way, 30 feet on each side of the center line on all state highways. Effective 1 June 1938 the Commission by regulation began to claim a 100 foot right of way on all state highway projects thereafter constructed. "[O]n all state highway projects constructed after June 1, 1938, the right of way shall extend 50 feet from the center of the highway on either side, unless a narrower or wider right of way is indicated by appropriate right of way markers on the ground." N.C. **Admin. Code** tit. 19A, r. 02B.0160 (Dec. 1994) (repealed 1993). Wendover Avenue is a State road which has been maintained as part of the State Highway system since 1930. Wendover was paved in the late 1940's. Around that time, the State Highway Commission, the DOT's predecessor, set concrete right of way monuments at 50 feet from the center line on the Haggerty, McIntosh and Willard properties. The defendants' deeds and instruments of conveyance in their chain of title included unrecorded surveys referencing a 50 foot right of way from the center of Wendover Avenue.

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Following a consolidated hearing, the trial court ruled that the DOT had existing rights of way 50 feet from the center of Wendover Avenue on all of the defendants' tracts.

Defendants appeal.

Attorney General Michael F. Easley, by Assistant Attorney General David R. Minges, for plaintiff-appellee.

Wyatt Early Harris & Wheeler, L.L.P., by Frank B. Wyatt and Stanley F. Hammer, for defendant-appellants.

EAGLES, Judge.

The only issue here is whether unrecorded maps and surveys which fail to show a subdivision of land support an offer of dedication in favor of the State of North Carolina. Defendants argue that an unrecorded survey or map, which does not reflect a subdivision of land, may not form the basis of a dedication to a state or agency. They argue that the plat or map must be recorded before a dedication becomes effective and that the landowner must have intended to make a dedication. In addition, they argue that the plats here do not reflect a subdivision of lots for sale. They rely on G.S. 136-96 and G.S. 136-102.6 to support their argument that the plat or survey must be recorded. After careful review, we disagree.

"Generally, where lots are sold and conveyed by reference to a plat which represents the division of a tract into streets and lots, recordation of the plat is an offer to dedicate those streets to the public." *Tower Development Partners v. Zell*, 120 N.C. App. 136, 141, 461 S.E.2d 17, 20 (1995). However, under a common law dedication, subjective intent to make a dedication and a recording of the plat is unnecessary. *Tise v. Whitaker*, 146 N.C. 374, 376, 59 S.E. 1012, 1013 (1907). An implied dedication can arise out of the acts of the owner. *Id.* at 376. "A map or plat referred to in a deed becomes part of the deed and need not be registered." *Kaperonis v. Highway Commission*, 260 N.C. 587, 597, 133 S.E.2d 464, 471 (1963) (quoting *Collins v. Land Co.*, 128 N.C. 563, 565, 39 S.E. 21, 22 (1901)). Therefore, as long as the landowner has notice of the plat through his deed, the plat does not have to be recorded in order to effect a right of way dedication. Once a right of way dedication has taken place and becomes open to the public and at least part of the area is maintained, the period of use becomes immaterial and the dedication becomes irrevocable. *Steadman v. Pinetops*, 251 N.C. 509, 516, 112 S.E.2d 102, 107 (1950).

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[127 N.C. App. 502 (1997)]

Here the defendants' deeds referred to plats that showed the 100 foot right of way. In addition, the defendants allowed public utilities, without easements, to place utility poles on the defendants' land more than 30 feet from the center of Wendover Avenue. The DOT correctly argues that this shows objectively an intent to dedicate a 50 foot right of way. In 1940, the State Highway Commission also set concrete right of way monuments on the Haggerty, McIntosh and Willard properties which should have put the defendants on notice of the 50 foot right of way being claimed by the Highway Commission. Finally, the tax cards for Stevens,' McIntosh's and Haggerty's predecessors showed that the defendants were not paying ad valorem taxes on the land within the 100 foot right of way. This further suggests that the defendants had notice of and intended or acquiesced in the right of way being claimed by the DOT.

Affirmed.

Judges MARTIN, John C., and TIMMONS-GOODSON concur.



DEAN M. ASFAR, PLAINTIFF V. CHARLOTTE AUTO AUCTION, INC., DEFENDANT

No. COA96-1516

(Filed 7 October 1997)

Automobiles and Other Vehicles § 691 (NCI4th)— plaintiff struck as auto driven from auction building—res ipsa loquitur—evidence insufficient

The trial court did not err by granting defendant's motion for a judgment notwithstanding the verdict in an action arising from an injury sustained by plaintiff when he was struck by an automobile as it was driven from an auction building where the evidence in the record did not support a conclusion that defendant failed to keep a proper lookout or that the vehicle was traveling at excessive speed. Plaintiff's argument that defendant was negligent under the theory of *res ipsa loquitur* failed because there was no evidence that defendant moved from a designated lane of travel.

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[127 N.C. App. 502 (1997)]

Appeal by plaintiff from judgment dated 18 September 1996 by Judge Richard D. Boner in Mecklenburg County District Court. Heard in the Court of Appeals 28 August 1997.

Bednarik & Wamsley, by Paul G. Wamsley, for plaintiff appellant.

Crews & Klein, P.C., by James N. Freeman, Jr., for defendant appellee.

GREENE, Judge.

Dean M. Asfar (plaintiff) appeals the trial court's judgment granting Charlotte Auto Auction, Inc.'s (defendant) motion for judgment notwithstanding the verdict (JNOV) and the granting of defendant's motion for a conditional new trial.

In this case, the plaintiff sustained an injury when he was hit by an automobile owned by the defendant and driven by an agent of the defendant. The complaint included, among other things, allegations that the defendant's agent failed to keep a proper lookout; failed to decrease the speed of the automobile; and that the automobile was driven at an unreasonable speed under the existing conditions.

The evidence reveals, when considered in the light most favorable to the plaintiff, *see Post & Front Properties v. Roanoke Construction Co.*, 117 N.C. App. 93, 449 S.E.2d 765 (1994) (review of JNOV grant requires evaluation of evidence in light most favorable to the non-moving party), that on 13 January 1993, the plaintiff attended an automobile auction owned and operated by the defendant. The plaintiff, along with Mr. Joseph Abraham (Mr. Abraham), an acquaintance who also later testified as a witness, were standing outside the auction building and watching the automobiles that were being auctioned inside. The automobiles were driven into the building through a large entrance located on one end of the building and were auctioned inside on an auctioning block. Afterwards, the automobiles were driven through the exit at the other end of the building. The plaintiff and the witness were standing at the exit end of the building to the side of the driveway on which the automobiles were driven through the building. The plaintiff saw a red automobile, driven by an agent of the defendant, while it was parked inside the auction building. The plaintiff then did not see the automobile until it struck his left foot and leg, causing him to fall. Mr. Abraham later testified that the automobile turned to the left just before it hit the plaintiff. Both

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the plaintiff and Mr. Abraham asserted there were no visual obstructions between them and the exit to the auction building.

A jury verdict awarded the plaintiff damages against the defendant in the amount of \$3,056.00. After the reading of the verdict but before entry of the judgment, the defendant moved for a JNOV pursuant to Rule 50(c) of the North Carolina Rules of Civil Procedure and for a conditional new trial pursuant to Rules 50(c) and 59 of the Rules of Civil Procedure. The trial judge granted the motions for JNOV and, in the alternative, a conditional new trial should the JNOV be vacated or remanded on appeal.

The dispositive issue is whether the plaintiff presented substantial evidence of the defendant's breach of duty.

This Court's review of a trial court's grant of a JNOV is the same as the review of the grant of a motion for directed verdict. *Ace, Inc. v. Maynard*, 108 N.C. App. 241, 245, 423 S.E.2d 504, 507 (1992), *disc. review denied*, 333 N.C. 574, 429 S.E.2d 567 (1993). The essential question is whether plaintiff met his burden at trial of presenting substantial evidence of his claim when all of the evidence is taken in the light most favorable to the plaintiff and all inconsistencies are resolved in favor of the plaintiff. *Id.* Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

This claim is based on negligence and "in order to prevail . . . the plaintiff[] must offer evidence of the essential elements of negligence: duty, breach of duty, proximate cause, and damages." *Camalier v. Jeffries*, 340 N.C. 699, 706, 460 S.E.2d 133, 136 (1995). In some instances, however, "the nature of the occurrence itself furnishes circumstantial evidence" of negligence, *Greene v. Nichols*, 274 N.C. 18, 27, 161 S.E.2d 521, 527 (1968), and these instances are recognized under the doctrine known as *res ipsa loquitur*. *Id.* Under this doctrine, when an automobile leaves a highway and does so without apparent cause "an inference of the driver's actionable negligence arises . . ." *Id.* This doctrine is based on the common experience that an automobile traveling on a highway "does not suddenly leave it if the driver uses proper care." *Greene*, 274 N.C. at 26, 161 S.E.2d at 526.

The plaintiff relies on *res ipsa loquitur* and argues that the evidence in this case supports an inference of the defendant's negli-

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gence. We disagree. In this case there is evidence that the automobile began to turn to the left but there is no evidence that the defendant was driving his automobile in a designated lane of travel and moved from that designated lane of travel. Thus, the fact that the defendant's automobile turned to the left is not indicative of any negligent conduct and there is, therefore, no inference that the defendant failed to use proper care.

The trial court, therefore, correctly granted the defendant's motion for JNOV. There simply is no evidence (direct or inferred) in this record that can support a conclusion that the defendant failed to keep a proper lookout. Furthermore, there is no evidence of excessive speed. Having affirmed the trial court's grant of a JNOV to the defendant, we need not address whether the trial court correctly granted the alternative motion for a conditional new trial.

Affirmed.

Judges WYNN and MARTIN, Mark D., concur.

IN THE MATTER OF BRITTNY NICOLE HELMS

No. COA97-45

(Filed 21 October 1997)

1. Trial § 597 (NCI4th)—juvenile neglect—findings and conclusions distinguished

As a general rule, any determination requiring the exercise of judgment or application of legal principles is classified a conclusion of law, while any determination reached through logical reasoning from the evidentiary facts is classified a finding of fact. The determination of neglect in juvenile cases requires the application of the legal principles set forth in N.C.G.S. § 7A-517(21) and is therefore a conclusion of law. The determinations that DSS has made reasonable efforts to prevent the need for removal of the child from the parent and that it is in the best interest of the child to be in the custody of DSS are conclusions of law because they require an exercise of judgment.

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2. Infants or Minors § 120 (NCI4th)— juvenile neglect order—finding that child exposed to risk—supported by evidence

Clear and convincing competent evidence supports a trial court's finding of fact in a juvenile neglect order that respondent had exposed her child to risk by allowing her extended contact with Strube and Helms, respondent's father and the putative father of the child, in that the record reveals that both were abusive to respondent, Strube used cocaine and has attempted to assault respondent sexually, and, in violation of DSS protection plans, respondent and the child lived with Strube and respondent continued to allow Helms extended and unsupervised contact with the child.

3. Infants or Minors § 120 (NCI4th)— conclusion that juvenile neglected—findings—unstable living arrangements

The trial court's conclusion of law that Brittany is a neglected juvenile was supported by findings of fact that Brittany was substantially at risk due to the instability of her living arrangements and that the environment in which respondent and Brittany lived was injurious in that it involved drugs, violence, and attempted sexual assault.

4. Infants or Minors § 126 (NCI4th)— juvenile neglect order—conclusion of reasonable efforts by DSS—supported by findings

The trial court's conclusion that DSS made reasonable efforts to prevent a child's removal from her home was supported by evidence, reflected in the findings, that DSS entered into four different protection plans with respondent which reflect an effort by DSS to stabilize the child's home environment and protect her from violent individuals and drugs and which also encouraged respondent to apply for food stamps, AFDC, and Medicaid.

5. Infants or Minors § 128 (NCI4th)— juvenile neglect—child's best interest—DSS custody—conclusion supported by finding

The trial court's conclusion that it was in a child's best interest to continue in the custody of DSS pending respondent-mother's compliance with reunification measures was supported by findings that the child lived in an environment injurious to her welfare and that respondent had failed to comply with DSS's efforts to prevent removal.

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6. Infants or Minors § 122 (NCI4th)—juvenile neglect order—reunification requirements—child's best interests—conclusion supported by findings

There were sufficient findings in a juvenile neglect order to support the conclusion that reunification requirements are in the child's best interests where the finding that respondent moved several times during the four months she retained custody of Brittny supports the conclusion that it is in the child's best interest for respondent to provide a stable environment; the findings that respondent's father used cocaine and that respondent and the child tested positive for drugs support the conclusion that it is in the child's best interest for respondent to submit to drug testing and provide a drug-free environment for the child; the findings that respondent's father and the child's putative father have repeatedly abused respondent support the conclusion that it is in the child's best interest for respondent to cooperate with domestic violence and dependency counseling; and the findings that respondent continued to allow her father and the child's father access to Brittny despite their violent behavior, and the finding that Brittny may have been malnourished, support the conclusion that it is in Brittny's best interest for respondent to complete a parenting course.

Appeal by Respondent Crystal Strube from order dated 17 September 1996 by Judge William G. Hamby, Jr. in Cabarrus County District Court. Heard in the Court of Appeals 11 September 1997.

Kathleen Marie Widelski, for Cabarrus County Department of Social Services, petitioner appellee.

Mary Beth Smith, for Crystal Strube, respondent appellant.

Amy Zacharias, Guardian ad Litem, Attorney Advocate.

GREENE, Judge.

Crystal Strube (Respondent) appeals from an order adjudicating her daughter, Brittny Nicole Helms (Brittny), a neglected juvenile and granting continued custody to the Cabarrus County Department of Social Services (DSS).

Brittny was born 15 September 1994. DSS initially became involved upon receiving an unconfirmed report that a newborn girl had tested positive for cocaine. Respondent, an unemployed sixteen-

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year-old who did not attend school, denied any drug involvement, but revealed that her father, Johnny Strube (Strube), smoked crack cocaine while she was living with him during her pregnancy.

A protection plan was entered into between DSS and Respondent on 16 September 1994, the details of which are not in the record. A second protection plan was entered on 29 November 1994, requiring Respondent to: (1) provide a stable environment for Brittny; (2) stay at the home of Elizabeth Starnes, the putative paternal grandmother; (3) refrain from physical or verbal violence in front of Brittny; (4) refrain from exposing Brittny to cocaine; and (5) not take Brittny to Strube's home for extended periods.

On 2 January 1995, Respondent told DSS that Strube, her father, "was on probation for cocaine and that he goes into 'the bottom' to buy cocaine . . . [and] he had cut her; he had dragged her with a machete into a bedroom and tried to remove her clothes," but was interrupted when her stepbrother entered the room. Respondent also told DSS that the putative father, Terry Helms (Helms), had tried to run over her with a car. Respondent obtained a warrant against Helms due to his abuse, but subsequently dropped it. Based on Respondent's determination of the safest place for herself and Brittny, on 4 January 1995, a third protection plan was entered between Respondent and DSS. This plan required Brittny to live with Debra Hartsell (Hartsell), Respondent's mother, until the investigation was complete, with Respondent caring for Brittny in the Hartsell home during the day while Hartsell was at work. Respondent was also required to check on obtaining Aid to Families with Dependent Children (AFDC) and Medicaid. Finally, the plan allowed Respondent to continue to date Helms, but allowed Helms access to Brittny only at the Hartsell home. The social worker noted that when he saw Brittny on 4 January 1995, she was "happy . . . [and] laughing and smiling and . . . clean and appropriately dressed." Testimony revealed that Respondent and Brittny lived with Strube for brief periods of time during January 1995; Respondent and Brittny also stayed overnight with Helms at some points. On 23 January 1995, Respondent admitted that she had not abided by the protection plans, and that she was currently living with her cousin. At this time a fourth protection plan was entered between Respondent and DSS requiring Respondent to: (1) continue living at her cousin's; (2) supervise and meet the needs of Brittny; (3) take Brittny to medical appointments; (4) apply for AFDC and food stamps; and (5) notify DSS if she again changed addresses. The next day Respondent notified DSS that she

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and Brittny were living with Chris Booth, one of Respondent's friends. Respondent also stated that she refused to apply for AFDC and food stamps. On 27 January 1995, DSS discovered that Respondent and Helms had rented an apartment which they planned to move into with Brittny. DSS took custody of Brittny later that afternoon.

At the hearing, the guardian ad litem report was received into evidence showing that "[Respondent] tested positive for cocaine prenatally, and at birth both [Respondent] and Brittny tested positive for cocaine." The guardian ad litem report also notes that "at birth Brittny was in the 25th percentile for growth, but had slipped to the 5th percentile by the time she was taken into custody by DSS. Given Brittny's weight gains in foster care, [the doctor assigned to the case] stated that the reason for the previous poor growth was 'probably malnutrition.'" At the close of DSS's evidence and at the close of all the evidence, Respondent moved to dismiss for failure to show that Brittny is a neglected juvenile; the motions were denied.

The trial court found Respondent "did not have stable living arrangements and moved several times since the infant's birth." The court further found Respondent had no apparent means of support; had failed to comply with DSS's protection plans; and had exposed Brittny to risk by allowing extended contact with Strube, Respondent's father, a cocaine user who has been abusive to Respondent, and with Helms, Brittny's putative father, who has also been abusive to Respondent. The trial court also incorporated the guardian ad litem report into its findings of fact. The court, however, noted that Respondent's "devotion to the infant is clear as is the willingness of her family to help and there is no physical evidence of neglect."

The trial court concluded that Brittny was neglected in that she lived in an environment injurious to her welfare, and that it is in Brittny's best interest to remain in the custody of DSS until Respondent secures the return of her child by compliance with the following requirements:

- a. provide a stable, drug-free environment in which to live;
- b. cooperate with counseling for domestic violence and dependency issues;
- c. maintain one consistent residence for a minimum of three months;

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- d. submit to drug testing; any fees involved are waived;
- e. complete a parenting course, demonstrating an ability to parent her child; any fees involved are waived.

The trial court further concluded that DSS had “made reasonable efforts to prevent the need for foster care.” The trial court then ordered that Brittny remain in the custody of DSS.

The issues are whether: (I) there is clear and convincing evidence to support the trial court’s findings of fact that Respondent has placed Brittny at risk by exposing her to Strube and Helms; and (II) the findings of fact support the conclusions of law that (A) Brittny is a neglected juvenile, (B) DSS has made reasonable efforts to prevent the need for removal, (C) it is in Brittny’s best interest to remain in the custody of DSS,¹ and (D) the requirements for reunification of Respondent and Brittny are consistent with N.C. Gen. Stat. § 7A-650(b2).

[1] The trial court found both as facts and as conclusions of law that (i) Brittny is a neglected juvenile, (ii) DSS has made reasonable efforts to prevent removal, and (iii) it is in Brittny’s best interest to remain in the custody of DSS. These determinations, however, are more properly designated conclusions of law and we treat them as such for the purposes of this appeal. *See In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (limiting review of conclusions of law to whether they are supported by findings of fact). The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, *see Plott v. Plott*, 313 N.C. 63, 74, 326 S.E.2d 863, 870 (1985), or the application of legal principles, *see Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982), is more properly classified a conclusion of law. Any determination reached through “logical reasoning from the evidentiary facts” is more properly classified a finding of fact. *Quick*, 305 N.C. at 452, 290 S.E.2d at 657-58 (quoting *Woodard v. Mordecai*, 234 N.C. 463, 472, 67 S.E.2d 639, 645 (1951)). The determination of neglect requires the application of the legal principles set forth in N.C. Gen. Stat. § 7A-517(21) and is therefore a conclusion of law. The reason-

1. Respondent also contends that the trial court erred in denying her motions to dismiss; however, because we hold that clear and convincing competent evidence supports the trial court’s findings of fact, and the findings of fact support the conclusions of law, we also hold that the trial court properly denied the motions to dismiss.

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able efforts and best interest determinations are conclusions of law because they require the exercise of judgment.

I

[2] Allegations of neglect must be proven by clear and convincing evidence. N.C.G.S. § 7A-635 (1995). In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings. See *Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253; *Matthews v. Prince*, 90 N.C. App. 541, 545, 369 S.E.2d 116, 117 (1988).

In this case, clear and convincing competent evidence supports the trial court's findings of fact that Respondent has exposed Brittny to risk by allowing her extended contact with Strube and Helms. The record reveals that both Strube and Helms were abusive to Respondent; in addition, Strube used cocaine and has attempted to assault Respondent sexually. The record also reveals that, in violation of DSS's protection plans, Respondent and Brittny lived with Strube during January, and Respondent continued to allow Helms extended and unsupervised contact with Brittny.

II

Our review of a trial court's conclusions of law is limited to whether they are supported by the findings of fact. *Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253.

A

[3] A "neglected juvenile" is defined in part as one who "does not receive proper care, supervision, or discipline from the juvenile's parent . . . ; or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7A-517(21) (1995). This Court has additionally "required that there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide 'proper care, supervision, or discipline' " in order to adjudicate a juvenile neglected. *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (listing cases holding that a substantial risk of impairment is sufficient to show neglect) (emphasis added). The inability to maintain secure living arrangements is relevant to a determination of whether there is a substantial risk of injury to the juvenile. See *In re Evans*, 81 N.C. App. 449, 452, 344 S.E.2d 325, 327 (1986) (noting the "substantive difference between the quantum of adequate proof of neglect . . . for pur-

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poses of termination and for purposes of removal”); *In re Adcock*, 69 N.C. App. 222, 225-26, 316 S.E.2d 347, 348-49 (1984) (moving eight times within a year and a half is evidence of instability relevant to a neglect determination).

In this case, the findings of fact reveal that Brittny was substantially at risk due to the instability of her living arrangements, and Respondent and Brittny moved at least six times during the four months Respondent retained custody. Respondent also placed Brittny at substantial risk through repeated exposure to violent individuals, one of whom uses cocaine. Furthermore, the environment in which Respondent and Brittny lived was injurious in that it involved drugs, violence, and attempted sexual assault. The trial court’s findings of fact therefore support the conclusion of law that Brittny is a neglected juvenile.

B

[4] An order authorizing DSS’s continued custody of a neglected juvenile “shall include findings as to whether reasonable efforts have been made to prevent or eliminate the need for placement of the juvenile in custody.” N.C.G.S. § 7A-577(h) (1995). At the time this action was commenced, 27 January 1995, our juvenile code did not define “reasonable efforts”² and neither did the federal law on which our state statute is based. *See* 42 U.S.C. § 671(a)(15) (Supp. 1997) (requiring states to make “reasonable efforts . . . to prevent or eliminate the need for removal” in order to receive federal funding for the state’s foster care program). Because of this lack of definition, the district courts are given great discretion in determining what efforts are reasonable in each case and whether those efforts have been made by DSS. *In re H.L.B.R.*, 567 N.W.2d 675, 679 (Iowa App. 1997).³ In this

2. The General Assembly has recently defined “reasonable efforts” as the “diligent use of preventive or reunification services by [DSS] when a juvenile’s remaining at home . . . is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time.” 1997 N.C. Sess. Laws ch. 390, § 3 (effective date 1 October 1997) (to be codified at N.C.G.S. § 7A-517(25a)). A “safe home” is one “in which the child is not at substantial risk of physical or emotional abuse or neglect.” *Id.* (to be codified at N.C.G.S. § 7A-517 (25b)).

3. We do note that there exists a federal regulation setting forth a nonexclusive list of services which *may* satisfy the “reasonable efforts” requirement. 45 C.F.R. § 1357.15(e)(2) (1996) (*i.e.*, crisis counseling, individual and family counseling, services to unmarried parents, mental health counseling, drug and alcohol abuse counseling, homemaker services, day care, emergency shelters, vocational counseling, emergency caretaker, and “other services which the agency identifies as necessary and appropriate”).

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case, DSS entered into four different protection plans with Respondent regarding the care and protection of Brittny. These plans reflect an effort by DSS to stabilize Brittny's home environment and protect her from violent individuals and drugs. The plans also encouraged Respondent to apply for food stamps, AFDC, and Medicaid. This evidence, which is reflected in the findings of the trial court, supports the conclusion that DSS made reasonable efforts to prevent Brittny's removal from her home.

C

[5] A neglected juvenile may be placed in the custody of DSS when the court determines it to be in the best interest of the juvenile. N.C.G.S. § 7A-647(2)(c) (1995).

The findings of fact noted above in support of the conclusion of law that Brittny lived in an environment injurious to her welfare, combined with the finding that Respondent failed to comply with DSS's efforts to prevent removal, support the conclusion of law that it is in Brittny's best interest to continue in the custody of DSS pending Respondent's compliance with reunification measures.

D

[6] The trial court ordered Respondent to "provide a stable, drug-free environment," "cooperate with counseling for domestic violence," "submit to drug testing," and "complete a parenting course." This order was based on the conclusion of the trial court that these steps were in Brittny's best interest. This action by the trial court is specifically authorized by our statutes, N.C.G.S. § 7A-650(b2) (trial court may require counseling or other treatment "directed toward remediate or remedying behaviors or conditions that led to or contributed to . . . the court's decision to remove custody" where it determines such treatment is in the best interest of a neglected child), and Respondent does not argue otherwise.

Respondent does argue that there are insufficient findings to support the conclusion⁴ that the reunification requirements are in Brittny's best interest. We disagree. In this case, the finding that Respondent moved several times during the four months she retained custody of Brittny supports the conclusion that it is in Brittny's best

4. The trial court classified its reunification requirements as both a finding of fact and a conclusion of law. Because this determination requires the application of legal principles pursuant to section 7A-650(b2), the determination is more properly classified a conclusion of law.

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interest for Respondent to provide a stable environment for Brittny. The findings that Strube, Respondent's father, used cocaine, and that both Respondent and Brittny tested positive for drugs, support the trial court's conclusion that it is in Brittny's best interest for Respondent to submit to drug testing and provide a drug-free environment for Brittny. The findings that both Strube and Helms have repeatedly abused the Respondent support the conclusion that it is in Brittny's best interest for Respondent to cooperate with domestic violence and dependency counseling. Finally, the findings that Respondent continued to allow Strube and Helms unrestricted access to Brittny despite their violent behavior, and that Brittny may have been malnourished, support the conclusion that it is in Brittny's best interest for Respondent to complete a parenting course in order to regain custody of Brittny.⁵

Affirmed.

Judges WYNN and MARTIN, Mark D., concur.

WILLIAM Z. DEASON, PLAINTIFF v. J. KING HARRISON CO., INC. D/B/A J. KING HARRISON TRANSPORTATION CO., INC. AND AMERICAN NATIONAL FIRE INSURANCE COMPANY, DEFENDANTS

No. COA96-1527

(Filed 21 October 1997)

**Insurance § 896 (NCI4th)— premises-operations coverage—
completed operations exclusion—bales negligently loaded
in trailer—injury when trailer door subsequently opened
off-site**

The trial court did not err by concluding that defendant-insurer was entitled to a judgment in its favor where defendant Harrison loaded bales of fiber onto a trailer, plaintiff was injured when he opened the rear door of the trailer in Kansas City and a bale of fiber fell onto him, plaintiff alleged that defendant

5. Respondent assigns error to each of the trial court's conditions for reunification; however, she does not argue before this Court that the trial court *erred* in ordering her to maintain a consistent residence for a minimum of three months. We do not address this portion of the assignment of error, as it has been abandoned. N.C. R. App. P. 28; *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976).

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Harrison had negligently loaded the trailer, and defendant-insurer had issued Harrison a premises-operations liability policy with a completed operations exclusion. Plaintiff's injuries arose from the use of the premises covered by the policy, but fell within the completed operations exclusion because they occurred off the premises and after the operations had been completed. The loading of bales was completed because everything necessary for the loading of bales at the site had been completed.

Judge WYNN dissenting.

Appeal by plaintiff from judgment dated 23 September 1996 by Judge Melzer A. Morgan, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 August 1997.

Waggoner, Hamrick, Hasty, Monteith and Kratt, PLLC, by S. Dean Hamrick and G. Bryan Adams, III, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, PLLC, by Richard T. Rice and Lawrence B. Somers, for defendants appellees American National Fire Insurance Company.

GREENE, Judge.

William Z. Deason (plaintiff) appeals from a judgment denying his claim against American National Insurance Company (American National). The trial court granted judgment for the plaintiff against J. King Harrison Co., Inc., d/b/a J. King Harrison Transportation Company, Inc. (Harrison) and there is no appeal from that judgment.

The undisputed evidence reveals: Plaintiff is a resident of Missouri and Harrison is a North Carolina corporation with a place of business in Charlotte. American National is an insurance company authorized to do business in North Carolina and issued an Owners', Landlords' and Tenants' Liability Insurance policy (commonly known as a premises-operations policy¹) to Harrison who was engaged in the sale of cotton and fiber products at 1605-09 North Brevard Street in Charlotte. This policy provides coverage for the "designated premises [1605-09 N. Brevard St., Charlotte, NC] and related operations in progress," including bodily injury "caused by an occurrence and arising out of the ownership, maintenance or use of the insured premises

1. See *Lindley Chemical, Inc. v. Hartford Acci. and Indemn. Co.*, 71 N.C. App. 400, 403, 322 S.E.2d 185, 187 (1984).

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and all operations necessary or incidental thereto." The policy contains the following exclusion, known as the "completed operations hazard":

This insurance does not apply to

- (p) to bodily injury or property damage included within the completed operations hazard.

The policy also contains the following relevant definitions:

"completed operations hazard" includes bodily injury and property damage arising out of operations . . . if the bodily injury or property damage occurs after such operations have been completed . . . and occurs away from premises owned by or rented to the named insured. . . . Operations shall be deemed completed . . . :

. . . .

- (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, . . .

. . . .

Operations which may require further service or maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

The completed operations hazard does not include bodily injury or property damage arising out of

- (a) operations in connection with the transportation of property unless the bodily injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof.

On 1 March 1988, Harrison loaded bales of fiber onto the trailer of a tractor-trailer owned by J.B. Hunt Transportation, Inc. (Hunt). The trailer was transported to Kansas City arriving on 3 March 1988 where the plaintiff, an employee of Hunt, was injured when he opened the rear door of the trailer and a bale of fiber fell out of the trailer onto him.

Plaintiff filed suit against Harrison in Missouri, alleging Harrison had improperly loaded the trailer. American National denied cover-

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age and advised Harrison that it would not provide a defense to the claim. Plaintiff obtained a final judgment against Harrison in the amount of \$1,055,000.00. The judgment contained a finding that Harrison was negligent in loading the bales of fiber onto the trailer.

When Harrison did not pay the judgment, plaintiff filed this action in North Carolina against Harrison and American National. American National filed an answer denying liability under the policy to plaintiff or Harrison. Harrison did not file an answer. The trial court entered judgment against Harrison in the amount of the underlying Missouri judgment, but concluded as a matter of law that American National was entitled to a judgment in its favor because plaintiff's injuries fell within the "completed operations hazard" exclusion of the insurance policy.

The dispositive issue is whether this "premises-operations" liability insurance policy, containing a "completed operations hazard" exclusion, provides coverage for injuries sustained off premises, but resulting from negligence occurring on the insured's premises.

It is well-settled law that an insurance policy is a contract and its provisions govern the rights and duties of the parties thereto, *Harrelson v. Insurance Co.*, 272 N.C. 603, 609, 158 S.E.2d 812, 817 (1967), and exclusions from coverage must be strictly construed. *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 114, 314 S.E.2d 775, 779 (1984).

In this case the injuries sustained by the plaintiff did arise "out of the . . . use of the" premises covered in the policy. At the same time the injuries sustained by the plaintiff fall within the "completed operations" exclusion in that they occurred off the premises *and* after the "operations" (the loading of the bales of fiber) had been completed. The loading of the bales was "completed," within the meaning of the policy, because everything necessary for the loading of the bales onto the truck trailer "at the site" had been completed. Furthermore, the fact that the bales of fiber may have been loaded negligently is not material to a determination of whether the loading was a "completed operation."² Indeed the policy specifically provides that any opera-

2. If negligence prevents an operation from being complete until the negligence is detected, then the completed operations hazard exclusion would be illusory and the insurer's liability would extend far beyond the limits of the intended coverage. Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations—What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 436-438 (1971). Premises-operations liability policies are intended to limit the insurer's liability for an

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tion that may "require further service or . . . correction" is nonetheless "completed" within the meaning of the policy. Finally, the exception to the "completed operations" exception (injuries arising out of the "operations in connection with the transportation of property") does not apply because the "operations" at issue specifically relate to the "loading" of a vehicle.

Our holding comports with this Court's decision in *Lindley*, which involved a premises-operations policy with the same "completed operations" exclusion contained in this case. *Lindley*, 71 N.C. App. at 403-04, 322 S.E.2d at 187-88. The insured in *Lindley* sold and delivered a cleaning solvent to a customer whose employee used the product at the customer's premises. *Id.* at 402, 322 S.E.2d at 187. The solvent ignited and severely burned the employee. *Id.* This Court held that the premises-operations policy did not provide coverage for the off-premises bodily injuries sustained by the employee and caused by the on-premises negligence of the insured, noting that the insured had handed over possession of the product. *Id.* at 403-04, 322 S.E.2d at 187-88.

In so holding we reject the plaintiff's contention that *Woodard v. Insurance Co.*, 44 N.C. App. 282, 261 S.E.2d 43 (1979), *disc. review denied*, 299 N.C. 546, 265 S.E.2d 406 (1980) and *Daniel v. Casualty Co.*, 221 N.C. 75, 18 S.E.2d 819 (1942) require a different result. Although both of those cases did extend coverage to off-premises injuries, neither involved the construction of a "premises-only" policy and are therefore simply inapplicable to this case.

Affirmed.

Judge MARTIN, Mark D., concurs.

Judge WYNN dissents with separate opinion.

Judge WYNN dissenting

J. King Harrison Co., Inc. purchased a premises-operations policy covering acts of negligence occurring on its premises. As a result of a negligent act by company employees on the company's premises, Mr. Deason was injured. Would a reasonable business expect to be

operation to its logical point of completion. To hold, as plaintiff argues, would convert premises-operations policies into comprehensive general liability policies without requiring payment of the additional premiums.

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covered under that policy for an act of negligence committed on the business premises which resulted in an injury off premises? I think so, and therefore dissent from the majority's holding to the contrary.

In the instant case, the policy begins with a plain statement that coverage included liability for bodily injury and property damage "caused by an occurrence and arising out of the ownership, maintenance, or use of the insured premises." After setting forth this brief description of the policy's coverage, the policy goes on to list seventeen exclusions from coverage. In order to deny coverage under this policy, the insurer relied on the sixteenth exclusion, which limited coverage:

(p) to bodily injury or property damage included within the completed operations hazard or the products hazard.

The definitions section of the policy defines "completed operations hazard" as:

bodily injury and property damage arising out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the named insured. "Operations" include materials, parts, equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:

- (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed,
- (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
- (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principle as part of the same project.

Operations which may require further service or maintenance work or correction, repair, or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

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The completed operations hazard does not include bodily injury or property damage arising out of

- (a) operations in connection with the transportation of property, unless the bodily injury or property damage arises out of a condition in or on a vehicle created by the loading or unloading thereof,
- (b) the existence of tools, uninstalled equipment or abandoned or unused materials, or
- (c) operations for which the classification stated in the policy or in the company's manual specifies "including completed operations."

In my opinion, the meaning of "completed operations hazard" is ambiguous under this policy. Ambiguities in insurance policies are strictly construed against the insurance company and in favor of the insured and coverage.¹ This rule is particularly appropriate when construing exclusions from coverage, which are not favored by the law.² Furthermore, policy provisions which extend coverage are construed liberally in favor of coverage.³ Finally, when an ambiguity exists, our case law has consistently held that it should be construed as a reasonable person in the position of the insured would have understood it to mean.⁴

A reasonable business in the position of the insured company would have understood claims such as Deason's to be covered. By the policy's terms of coverage, the company was protected for liability "caused by an occurrence and arising out of the ownership, maintenance, or use of the insured premises." A company purchasing such a policy would certainly expect to be protected if the business operations injured a pedestrian walking on the street in front of the business. There would be no less of an expectation of protection if the effect of the operations was felt at a distance from the premises.

Furthermore, to insure for the act under the circumstances of this case but not the injury that arises from the act appears to defy

1. *West American Insurance Co. v. Tufco Flooring East*, 104 N.C. App. 312, 320, 409 S.E.2d 692, 697 (1991), *disc. review denied*, 332 N.C. 479, 420 S.E.2d 826 (1992).

2. *Id.*

3. *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co.*, 326 N.C. 133, 142, 388 S.E.2d 577, 563 (1990).

4. *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978).

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logic. The injury that occurred here is precisely the type of liability that companies seek to insure in order to protect their company operations from potential multi-million dollar liability. Otherwise, the business would be exposed to substantial sources of liability, even though the company purchased protection from liability "caused by an occurrence and arising out of the ownership, maintenance, or use of the insured premises."

I would construe this policy as providing coverage so as not to defeat the reasonable expectations of the insured company in this case.

ROSEMARIE WELSHER, PLAINTIFF V. PAUL RAGER, DEFENDANT

No. COA96-1322

(Filed 21 October 1997)

1. Divorce and Separation § 563 (NCI4th)— New York child support order—children over eighteen—enforcement in North Carolina—UIFSA

The trial court erred by granting defendant's motion to dismiss a petition requesting registration and enforcement of a 1985 New York child support order where defendant signed the order voluntarily in New York, plaintiff still resides in New York but defendant moved to North Carolina, and defendant answered contending that the original 1980 divorce decree had only obligated him to support the children until they were eighteen and out of high school, that he had not knowingly agreed to pay support until they reached twenty-one, that making support payments to an adult over eighteen was unjustifiable, and asking that he be relieved of any obligation under the 1985 order. URESA was repealed effective 1 January 1996 and UIFSA adopted in its place. The trial court was apparently operating under repealed URESA procedures in that plaintiff's petition includes a document title referring to URESA and the trial court's order was on a form which indicated that the judge was presiding over a URESA session. Moreover, the trial court's single finding was that the children had reached eighteen; while such a finding may have been sufficient to deny enforcement under URESA since North

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Carolina provides for emancipation at eighteen, New York law provides that the age of emancipation is twenty-one. Applying the appropriate law, UIFSA, the record is devoid of a defense which would justify vacating a properly registered support order.

2. Divorce and Separation § 563 (NCI4th)— enforcement of foreign support orders—Uniform Interstate Family Support Act

The Uniform Interstate Family Support Act, UIFSA, effective 1 January 1996, establishes a one order system whereby all adopting states are required to recognize and enforce the same obligation consistently; where only one tribunal has issued a support order, that order becomes the one to be recognized and enforced by adopting states, even if the state initiating the order has not adopted UIFSA. Enforcement by the registering state is obligatory once the validity of the order is determined, with two exceptions, and a non-registering party may also avoid enforcement by contesting registration. A party seeking to vacate an order's registration has the burden of proving at least one of seven narrowly-defined defenses. While URESA required that the law applied be that of the enforcing state, UIFSA provides that the law of the issuing state governs obligations of support and payment of arrears.

3. Divorce and Separation § 563 (NCI4th)— child support—foreign orders prior to 1 January 1996—UIFSA applicable

UIFSA governs the proceedings over any foreign support order which is registered in North Carolina after 1 January 1996 and is applicable to an order issued prior to that date.

4. Divorce and Separation § 564 (NCI4th)— New York child support order—FFCCSOA

The trial court erred in failing to use New York law under the Federal Full Faith and Credit for Child Support Orders Act, FFCCSOA, in interpreting a child support order involving defendant's eighteen- and twenty-one-year-old sons. FFCCSOA, which is similar to UIFSA, obligates states to enforce a child support order issued by another state which is consistent with the Act's jurisdiction and due process standards. Modification is allowed only on two conditions, and it has been held that FFCCSOA requires that the law of the rendering state govern the order's interpretation.

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Appeal by plaintiff from order entered 12 August 1996 by Judge Roland H. Hayes in Forsyth County District Court. Heard in the Court of Appeals 19 August 1997.

Attorney General Michael F. Easley, by Associate Attorney General Robert A. Crabill, for plaintiff-appellant.

Paul Rager, defendant-appellee, pro se.

TIMMONS-GOODSON, Judge.

This action arises out of plaintiff Rosemarie Welsher's attempt to enforce a New York child support order. Plaintiff and defendant Paul Rager were divorced in 1980. In 1985, plaintiff petitioned for a court order recognizing an agreement for support executed by plaintiff and defendant on 17 January 1985. The order entered on 11 February 1985 in Monroe County, New York District Court provided, in pertinent part, that defendant was to be "legally responsible for the support" of the couple's two sons, Jeremy (born 26 May 1974) and Michael (born 26 November 1976). The order obligated defendant to make payments of \$45.00 per week. Defendant signed the order voluntarily, waiving his right both to be represented by an attorney and to object to the matter in family court.

Plaintiff still resides in New York. However, defendant has moved to Winston-Salem, North Carolina and has refused to make any of the \$45.00 payments since 6 July 1995. At that time, Jeremy and Michael were twenty-one and eighteen, respectively, and Michael had just graduated from high school.

Plaintiff initiated the present action by filing a petition requesting registration and enforcement of the 1985 New York child support order in Forsyth County, North Carolina. At the time that this petition was filed, Jeremy and Michael were aged twenty-two and nineteen, respectively. The petition claimed arrearage of \$1,789.64 as of 11 April 1996, and included both a copy of the original order for support and a copy of New York's Uniform Support of Dependent's Law section 31-3, which establishes the age of emancipation in the State of New York at twenty-one years.

Defendant responded by filing an "Answer for Civil Suit," which alleged, in pertinent part, that the couple's original 1980 divorce decree only obligated him to support the children until they were eighteen and out of high school; that he did not knowingly agree to pay support until the children reached twenty-one; and that he felt

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that making support payments to an "adult" over the age of eighteen was unjustifiable. Accordingly, defendant asked that the court relieve him of any obligation under the 1985 order for support. The answer was made in an unverified written statement and included no documentation pertaining to the divorce decree. We note that at no time did defendant seek to modify his obligation based on Jeremy's emancipation.

The matter was heard by Judge Roland H. Hayes during the 30 July 1996 civil session of Forsyth County District Court. After hearing the arguments of both parties and examining plaintiff's evidence, the trial court granted defendant's motion to dismiss, and denied plaintiff's request for continued support. Plaintiff appeals.

[1][2] Plaintiff brings forth four assignments of error on appeal. However, in light of our conclusions in regards to plaintiff's assignments of error 3 and 4, we need not address plaintiff's first two assignments of error at this juncture. We, therefore, proceed immediately to plaintiff's third assignment of error by which she argues that the trial court erred in failing to apply New York law in deciding whether to enforce the 1985 New York support order. Plaintiff contends that the Uniform Interstate Family Support Act (UIFSA), recently enacted by the North Carolina General Assembly, requires that a support order be interpreted according to the law of the state in which it is issued. We agree.

The Uniform Reciprocal Enforcement of Support Act (URESA) was repealed by the North Carolina General Assembly effective 1 January 1996. In its place, the legislature adopted UIFSA in Chapter 52C of our General Statutes. Both URESA and UIFSA were promulgated and intended to be used as procedural mechanisms for the establishment, modification, and enforcement of child and spousal support obligations. *See* N.C. Gen. Stat. § 52C-3-301 (1995), official comment. Under URESA, a state had jurisdiction to establish, vacate, or modify an obligor's support obligation even when that obligation had been created in another jurisdiction. The result was often multiple, inconsistent obligations existing for the same obligor. Injustice has occurred in that obligors could avoid their responsibility by moving to another jurisdiction and having their support obligations modified or even vacated.

UIFSA was designed to correct this problem. *See* Patricia Wick Hatamyar, *Critical Applications and Proposals for Improvement of the Uniform Interstate Family Support Act and The Full Faith and*

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Credit for Child Support Orders Act, 71 St. John's L. Rev. 1 (1997); David H. Levy & Cecilia A. Hynes, *Highlights of the Uniform Interstate Family Support Act*, 83 Ill. B.J. 647 (1997). UIFSA establishes a one order system whereby all states adopting UIFSA are required to recognize and enforce the same obligation consistently. A priority scheme is established for the recognition and enforcement of multiple existing support obligations. See N.C. Gen. Stat. § 52C-2-207(a) (1995). In instances where only one tribunal has issued a support order, that order becomes the one order to be recognized and enforced by states adopting UIFSA. See N.C.G.S. § 52C-2-207(a)(1). For example, the official comment to section 52C-6-603 of the North Carolina General Statutes notes,

[a]lthough RURESA specifically subjects a registered order to "proceedings for reopening, vacating, or staying as a support order of this State," these remedies are not authorized under UIFSA. While a foreign support order is to be enforced and satisfied in the same manner as if it had been issued by a tribunal of the registering state, the order to be enforced remains an order of the issuing state. Conceptually, the responding state is enforcing the order of another state, not its own order.

N.C. Gen. Stat. § 52C-6-603 (1995), official comment. The one order system is applicable even where the state initiating the order has not adopted UIFSA.

Once the validity of the one order is determined, enforcement by the registering tribunal is obligatory, with two exceptions. The registering tribunal may vacate or modify the order if (1) both parties consent to the modification, or (2) the child, the obligor and the individual obligee have all permanently left the issuing state and the registering state can claim personal jurisdiction over all of them. See N.C. Gen. Stat. § 52C-2-205 (1995), official comment.

A non-registering party may also avoid enforcement of an order by successfully contesting its registration. Upon filing, a support order becomes registered in North Carolina and, unless successfully contested, must be recognized and enforced. N.C.G.S. § 52C-6-603. The procedure for contesting a registered order is set out in Part Two of Article 6 of UIFSA, entitled "Contest of Validity of Enforcement." Under section 52C-6-607 of the General Statutes, a party seeking to vacate an order's registration has the burden of proving at least one of seven narrowly-defined defenses. The possible defenses are as fol-

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lows: (1) the issuing tribunal lacked jurisdiction; (2) the order was fraudulently obtained; (3) the order has been vacated, suspended or modified; (4) the issuing tribunal has stayed the order pending appeal; (5) the remedy sought is not available in this state; (6) payment has been made in full or in part; and (7) enforcement is precluded by the statute of limitations. N.C. Gen. Stat. § 52C-6-607(a) (1995). If the defending party either fails to contest the registration or does not establish a defense under 52C-6-607(a), the registering tribunal is required by law to confirm the order. N.C.G.S. § 52C-6-607(c).

In terms of choice of law, URESA generally required that the law applied in interpreting and/or enforcing the support order be that of the state in which enforcement was sought. *See Pieper v. Pieper*, 90 N.C. App. 405, 368 S.E.2d 422 (holding that URESA could not be used to enforce a foreign support order requiring support until age 22 since such an order could not have been issued under North Carolina law), *aff'd*, 323 N.C. 617, 374 S.E.2d 275 (1988). However, UIFSA provides, "The law of the issuing state governs the nature, extent, amount, and duration of current payments and other obligations of support and the payment of arrears under the order." N.C. Gen. Stat. § 52C-6-604(a) (1995). The official comment to section 52C-6-604 notes that this means "an order for the support of a child until age 21 must be recognized and enforced in that manner in a state in which the duty of support of a child ends at age 18." N.C.G.S. § 52C-6-604, official comment.

In the case *sub judice*, the trial court was apparently operating under repealed URESA procedures. Plaintiff's petition includes a document entitled "Plaintiff's Statement of Fact for Registration of Foreign Support Order Under URESA." The trial court's order is written on a form which reads, in pertinent part, "before the undersigned Judge presiding over the Uniform Reciprocal Enforcement of Support Act (U.R.E.S.A.) Session of the Civil District Court. . . ."

Plaintiff's support order became registered in North Carolina upon filing. Applying the appropriate law, UIFSA, the record is devoid of a defense under section 52C-6-607 of the General Statutes, which would justify vacating a properly registered support order. Under UIFSA, unless the court finds that the defendant has met his burden of proving one of the specified defenses, enforcement is compulsory. The trial court's single finding of fact in the present case was that the children had reached eighteen. Under URESA, such a finding may have been sufficient to deny enforcement since North Carolina law

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would have governed interpretation of the order, and provided for emancipation at eighteen. *See Pieper*, 90 N.C. App. 405, 368 S.E.2d 422. However, as URESA has been repealed, New York law, which provides that the age of emancipation is twenty-one, must be applied in enforcing the 11 February 1985 foreign order.

Moreover, the record is devoid of any evidence that either (1) both parties consented to a modification, or (2) the issuing state had lost continuing, exclusive jurisdiction over the order. Hence, no court of this jurisdiction may properly vacate or modify this order. *See* N.C.G.S. § 52C-2-205. If defendant wishes to have the order modified or vacated, he must pursue the matter in New York, which maintains continuing, exclusive jurisdiction over the order. *Id.*

[3] Although neither party raises the issue, it is important that we address the applicability of UIFSA to an order issued prior to the effective date of the Act. We now hold that UIFSA governs the proceedings over any foreign support order which is registered in North Carolina after 1 January 1996, UIFSA's effective date. This is consistent with the wording of the Act, which provides, in pertinent part, that the new law is "[applicable] to child support owed on or after [1 January 1996]," and keeps URESA laws in effect only for (1) "pending actions, rights, duties, or liabilities based on the Act," (2) "any penalty, forfeiture, or liability incurred under the Act," and (3) "for the purpose of sustaining any pending or vested right as of the effective date of this act and for the enforcement of rights, duties, penalties, forfeitures, and liabilities under the repealed laws." An Act to Improve the Enforcement of Child Support by Creating Additional Remedies, ch. 538, § § 7 and 8, 1 (1995). Further, North Carolina General Statutes section 52C-9-901 provides, "This Chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Chapter among the states enacting it." N.C. Gen. Stat. § 52C-9-901 (1995). Finally, our interpretation saves the courts from the arduous task of attempting to determine arrearage based on the application of two different sets of law to the same order. Other states addressing this issue have also applied the effective date of their own UIFSA laws in a similar way. *See Child Support Enforcement v. Brenckle*, 675 N.E.2d 390 (Mass. 1997) (applying UIFSA retroactively); *Cowan v. Moreno*, 903 S.W.2d 119 (Tex. Ct. App. 1995) (applying UIFSA to a 1982 foreign support order where UIFSA became effective in 1993). *But see Deltoro v. McMullen*, 471 S.E.2d 742 (S.C. Ct. App. 1996) (applying UIFSA prospectively due to a savings clause in the statute).

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[4] In her final assignment of error, plaintiff contends that the trial court erred in failing to use New York law in interpreting the order, as required by the Federal Full Faith and Credit for Child Support Orders Act (FFCCSOA), 28 U.S.C. § 1738B. Again, we agree.

FFCCSOA, which became effective on 20 October 1994, is extremely similar to UIFSA both in terms of structure and intent. The federal statute also obligates states to enforce, according to its terms, a child support order issued by another state which is made consistent with the Act's jurisdiction and due process standards. *See Kelly v. Otte*, 123 N.C. App. 585, 474 S.E.2d 131, 134, *disc. review denied*, 345 N.C. 180, 479 S.E.2d 204 (1996). Modification of a valid order is only allowed if: (1) all parties have consented to the jurisdiction of the forum state to modify the order; or (2) neither the child nor any of the parties remains in the issuing state and the forum state has personal jurisdiction over the parties. *Id.* This Court has previously held that, while the law of the forum state may apply to the enforcement and remedy applied to a registered foreign support order under URESA, FFCCSOA requires that the law of the rendering state govern the order's interpretation. *Id.*

In light of this Court's decision in *Kelly*, the trial court's findings and conclusions are not consistent with the requirements of FFCCSOA. Absent a finding concerning both parties' consent to the jurisdiction of this state to modify this order, or New York's lack of continuing, exclusive jurisdiction over the order, the trial court was required to give the order full faith and credit, enforcing the order and interpreting it according to the law of New York. Failure to do so was error.

We note that the trial court, applying New York law could properly find that defendant was not liable for any arrearage as to Jeremy, because Jeremy had reached the age of 21 prior to the 6 July 1995 date on which defendant ceased to make court-ordered support payments. However, the trial court is still without authority to modify the \$45.00 a week payment, as such modification is not allowed under UIFSA and FFCCSOA. The New York order does not provide a per child break-down regarding defendant's support obligation, but merely provides that \$45.00 per week is to be paid for both children. Absent further knowledge as to whether an adjustment would be permitted under New York law for Jeremy's emancipation, and in what proportion, enforcement of the order in any amount less than \$45.00 per week would be an impermissible modification of the New York

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order. Defendant's only recourse, in this case, then, is to seek modification of his child support obligation in New York, based upon Jeremy's emancipation. *See State, Dept. of Rev. v. Skladanuk*, 683 So. 2d 624 (Fl. Dist. Ct. App. 1996) (holding that FFCCSOA prevented Florida court from modifying the terms of a New York order as written regardless of the defendant's inability to pay and that the defendant was required to seek modification of his child support obligation in New York).

In sum, because the trial court failed to apply New York law in accordance with UIFSA and FFCCSOA, its order is vacated, and this matter is remanded to the trial court for hearing and the entry of an order not inconsistent with this opinion.

Reversed and remanded.

Judges EAGLES and MARTIN, John C., concur.

FRANCES GRANTHAM, EMPLOYEE, PLAINTIFF-APPELLEE v. R. G. BARRY CORPORATION,
EMPLOYER, TRANSPORTATION INSURANCE CO., CARRIER, DEFENDANT-APPELLANTS

No. COA96-1353

(Filed 21 October 1997)

1. Workers' Compensation § 420 (NCI4th)— occupational disease—change of condition—original award not law of case

The findings and conclusions rendered in the original workers' compensation opinion and award were not binding on the Industrial Commission as the law of the case on petitioner's claim for additional benefits due to a change of condition where the deputy commissioner in the original opinion ultimately concluded that plaintiff suffered from an occupational disease. The law of the case doctrine therefore does not preclude a finding of a change in condition and, when determining whether a change in condition exists, the Industrial Commission is not bound by prior orders. N.C.G.S. § 97-47.

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2. Workers' Compensation § 427 (NCI4th)— change of condition—increased benefits—evidence sufficient

There was ample competent evidence to support the Industrial Commission's determination that plaintiff suffered a change of condition pursuant to N.C.G.S. § 97-47 where plaintiff was awarded benefits for an occupational disease following a hearing in 1991; she claimed additional benefits at a hearing in 1994 for a change of condition; her doctor's treatment of her condition began in 1989 and continued through the first hearing in 1991 and the second hearing in 1994; the doctor testified by deposition that plaintiff's condition deteriorated significantly following the 1991 hearing and that her pulmonary function tests "were abnormal and worse than previously"; that her symptoms also worsened, including increased coughing, wheezing, and shortness of breath to the point that she was uncomfortable with the activities of daily living and that minor respiratory infections represented a severe threat to her health and well-being; and that she was totally disabled from gainful employment, that her condition would most likely worsen, and that asthma, a congenital aortic valve, and being a former smoker were minor factors. The doctor revised his opinion based on his treatment of plaintiff after the 1991 award.

Appeal by defendants from order entered 27 June 1996 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 August 1997.

Mast, Schulz, Mast, Mills & Stem, P.A., by Bradley N. Schulz and Christi C. Stem, for plaintiff-appellee.

Young Moore and Henderson P.A., by J. D. Prather and Dawn M. Dillon, for defendant-appellants.

MARTIN, Mark D., Judge.

Defendants R. G. Barry Corporation (Barry) and Transportation Insurance Company appeal from opinion and award of the North Carolina Industrial Commission (Commission) awarding plaintiff permanent and total disability benefits.

This is the second appeal arising out of the present case. Accordingly, we adopt the factual recitation from our previous opinion, *Grantham v. R. G. Barry Corp.*, 115 N.C. App. 293, 444 S.E.2d

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659 (1994) (hereinafter *Grantham I*), and update the relevant facts as follows.

Plaintiff worked for Barry from 1969 until 1989 in various positions manufacturing bedroom slippers. While employed by Barry, plaintiff was exposed to dust, mold, and certain chemical substances which caused plaintiff to experience allergic reactions.

On 27 April 1989, during an examination by Dr. William Yount, plaintiff complained of dizziness, sneezing, itching, and headaches. Dr. Yount opined plaintiff's symptoms were caused in part by her exposure to certain chemicals at Barry. In addition, Dr. Yount performed allergy tests and ultimately diagnosed plaintiff as suffering from, among other things, allergic rhinitis, asthma, and chronic obstructive pulmonary disease. In 1990 plaintiff filed I.C. Form 18, Notice of Accident, claiming permanent and total disability due to an occupational disease.

The deputy commissioner, in a 29 July 1991 opinion and award, found plaintiff reacted to chemicals present in the workplace and experienced allergic rhinitis, asthma, and chronic obstructive pulmonary disease. Although the deputy commissioner found that "none of [plaintiff's illnesses] was caused by plaintiff's employment," the deputy commissioner maintained "[p]laintiff's employment with defendant-employer increased her risk of suffering from the illnesses" and "aggravated her condition." Finally, the deputy commissioner denied plaintiff's claim for permanent and total disability but concluded:

1. Plaintiff suffers from an occupational disease within the meaning of G.S. § 97-53(13), inasmuch as her employment with [Barry] placed her at an increased risk of developing her illnesses and significantly aggravated her illnesses.
2. As a result of her occupational disease, plaintiff was temporarily and totally disabled from 4 May 1989 to 5 June 1989. G.S. § 97-29.

The deputy commissioner's opinion and award was affirmed by the Full Commission and this Court. *Grantham I*, 115 N.C. App. at 302, 444 S.E.2d at 664.

On 29 June 1994 plaintiff filed I.C. Form 33, Request for Hearing, claiming additional disability benefits beginning 1 March 1993 due to a change of condition pursuant to N.C. Gen. Stat. § 97-47. Following

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the hearing on 29 September 1994, the parties deposed Dr. Yount and submitted his deposition to the deputy commissioner.

In an opinion and award filed 9 August 1995, the deputy commissioner denied plaintiff's claim on the ground she had not suffered a change in condition within the meaning of section 97-47. Subsequently, plaintiff appealed to the Full Commission, which, by opinion and award filed 27 June 1996, reversed the deputy commissioner's order, concluded plaintiff had suffered a change of condition, and awarded plaintiff total and permanent disability benefits beginning 1 March 1993 and continuing for the remainder of plaintiff's life.

On appeal, defendants contend the Full Commission erred by (1) failing to apply the previous opinion and award filed 29 July 1991 as the binding law of the case, and (2) finding plaintiff suffered a change of condition affecting her physical capacity to earn wages without sufficient competent evidence in the record.

I.

[1] Defendants first contend the findings of fact and conclusions of law rendered in the deputy commissioner's 29 July 1991 opinion and award were binding on the Commission as the law of the case.

When an issue has been decided and affirmed by the appellate court but the cause is heard again for another reason at the trial level, the law of the case doctrine applies. *State v. Jackson*, 30 N.C. App. 187, 190, 226 S.E.2d 543, 545 (1976). Specifically, under this doctrine, "the trial court upon retrial is bound by [the prior] decision" *Id.*

Although, in *Grantham I*, the deputy commissioner, perhaps somewhat ambiguously, stated plaintiff's illnesses were not caused by her employment, she nonetheless found that plaintiff's employment with defendant placed her at "an increased risk of suffering from the illnesses" and that "her problems were clearly aggravated by the chemical exposures which she experienced in her employment." Based on the findings of fact, the deputy commissioner ultimately concluded, in her conclusions of law, that "plaintiff suffer[ed] from an occupational disease within the meaning of G.S. § 97-53(13)."

Therefore, the law of the case doctrine does not preclude a finding of a change in condition since the deputy commissioner, in

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Grantham I, ultimately concluded that plaintiff suffered from an occupational disease. As a result, the Commission's consideration of plaintiff's alleged change in circumstances was appropriate.

In determining whether a change in conditions exists, the Industrial Commission may

[u]pon its own motion or upon the application of any party in interest on the grounds of a change in condition . . . review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article, and shall immediately send to the parties a copy of the award.

N.C. Gen. Stat. § 97-47 (1991).

"A change of condition 'refers to conditions different from those' in existence when an award was originally made" *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 149, 468 S.E.2d 269, 274 (1996) (quoting *Sawyer v. Ferebee & Son, Inc.*, 78 N.C. App. 212, 213, 336 S.E.2d 643, 644 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986)). Under section 97-47 the Commission is not bound by prior orders when considering an alleged change of condition. Rather, the Commission may make new findings based on the additional evidence presented. *See Hubbard v. Burlington Industries*, 76 N.C. App. 313, 316, 332 S.E.2d 746, 748 (1985). For instance, "[w]hen the Industrial Commission finds on one occasion that a person is permanently partially disabled and on a later occasion finds based on additional evidence that the person is totally disabled this supports a finding of a change in condition." *Id.* *See also West v. Stevens Co.*, 12 N.C. App. 456, 461, 183 S.E.2d 876, 879 (1971).

In the present case, plaintiff, pursuant to N.C. Gen. Stat. § 97-47, requested the Industrial Commission to review her change in condition. After the parties deposed Dr. Yount on 7 November 1994, the Industrial Commission considered the additional evidence and found plaintiff had suffered a change in condition. Accordingly, the Commission's decision was proper and defendants' contention is without merit.

II.

[2] Defendants next contend the Full Commission erred by finding plaintiff suffered a change of condition affecting her physical

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capacity to earn wages without sufficient competent evidence in the record.

“The findings of fact by the Industrial Commission are conclusive on appeal, if there is any competent evidence to support them, and even if there is evidence that would support contrary findings.” *Richards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 118 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989). Conclusions of law, including whether there has been a change of condition pursuant to section 97-47, are reviewable *de novo* by this Court. *See id.*; *Lewis*, 122 N.C. App. at 149, 468 S.E.2d at 274.

“[I]n determining if a change of condition has occurred . . . the primary factor is a change in condition *affecting the employee's physical capacity to earn wages . . .*” *East v. Baby Diaper Services, Inc.*, 119 N.C. App. 147, 151, 457 S.E.2d 737, 740 (1995) (quoting *Lucas v. Bunn Manuf. Co.*, 90 N.C. App. 401, 404, 368 S.E.2d 386, 388 (1988)) (emphasis in original). “[T]he burden is on the party seeking the modification to prove the existence of the new condition and that it is causally related to the injury that is the basis of the award the party seeks to modify.” *Blair v. American Television & Communications Corp.*, 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996). An employee satisfies this burden by producing medical evidence showing “he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment.” *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

Dr. Yount’s treatment of plaintiff’s occupational disease began on 27 April 1989 and continued through the first hearing in 1991 and the second hearing in 1994. By deposition taken 7 November 1994, Dr. Yount testified that following the 1991 hearing, plaintiff’s condition deteriorated significantly. Moreover, Dr. Yount stated plaintiff’s pulmonary function tests “were abnormal and worse than previously.” Plaintiff’s symptoms also worsened, including increased coughing, wheezing, and, according to Dr. Yount, shortness of breath “to the point where she’s uncomfortable with activities of daily living and that minor respiratory infections . . . represent a severe threat to [plaintiff’s] health and well-being.” Dr. Yount further testified plaintiff was totally disabled from gainful employment and her condition would most likely get worse, resulting in a permanent disability. Dr. Yount testified that although plaintiff had asthma, a mild congenital aortic insufficiency, and was a former cigarette smoker, “those are

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probably minor factors in her impaired pulmonary function.” Instead, Dr. Yount maintained plaintiff’s exposure to chemicals at Barry was “the major contributor to her pulmonary problems.” Defendants failed to proffer any evidence contradicting Dr. Yount’s testimony.

As stated by our Supreme Court in *McLean v. Roadway Express*, 307 N.C. 99, 296 S.E.2d 456 (1982):

A physician’s change of opinion with respect to degree of permanent partial disability is not evidence of a change in condition within the meaning of N.C.G.S. 97-47 if it is based solely on his reconsidering the contents of the patient’s medical record as of the date of his first opinion. If, however, the physician examines his patient subsequent to the date of his first opinion and in the interim the patient’s physical condition has deteriorated, then a change of opinion with respect to the degree of permanent partial disability is evidence of a change in condition for purposes of N.C.G.S. 97-47.

McLean, 307 N.C. at 103, 296 S.E.2d at 459 (citations omitted). In the present case, Dr. Yount revised his opinion of plaintiff’s condition based on his treatment of plaintiff after the 29 July 1991 opinion and award of Deputy Commissioner Nance.

Accordingly, there was ample competent evidence to support the Commission’s determination that plaintiff suffered a change of condition pursuant to section 97-47. Furthermore, the Commission’s findings adequately support its legal conclusions, *see Simon v. Triangle Materials, Inc.*, 106 N.C. App. 39, 41, 415 S.E.2d 105, 106, *disc. review denied*, 332 N.C. 347, 421 S.E.2d 154 (1992). Accordingly, defendants’ contention fails.

Finally, after carefully reviewing defendants’ remaining assignments of error, we conclude they are wholly without merit.

Affirmed.

Judges GREENE and WYNN concur.

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STATE OF NORTH CAROLINA v. ANDY LAMONT DEESE

No. COA96-1310

(Filed 21 October 1997)

1. Criminal Law § 906 (NCI4th Rev.)— failure to instruct—entire charge not in record—alleged error not considered

The Court of Appeals could not consider alleged errors in the trial court's failure to give certain instructions where the record did not contain a transcript of the entire jury charge. N.C. R. App. P. 9(a)(3)(f).

2. Criminal Law § 1097 (NCI4th Rev.)— structured sentencing—mitigating factor—strong provocation—finding not required

The trial court did not err by failing to consider the statutory mitigating factor of strong provocation in sentencing defendant for second-degree murder where the evidence showed that after the initial confrontation in which defendant was threatened and challenged by the victim, defendant went inside his apartment, retrieved his shotgun, and returned to his front porch; the victim had abandoned the confrontation when defendant challenged him to resume his threats; and it was defendant who provoked the final confrontation resulting in the victim's death. N.C.G.S. § 15A-1340.16(e)(8).

3. Criminal Law § 1095 (NCI4th Rev.)— structured sentencing—advanced age of victim—not proper aggravating factor

The trial court erred by finding the statutory aggravating factor that the victim was "very old" in sentencing defendant for second-degree murder where evidence that the victim was seventy-three years old did not establish that he was more vulnerable to being mortally wounded by a twelve-gauge shotgun than a young person would have been, and there was no evidence suggesting that defendant took advantage of the victim's advanced years. N.C.G.S. § 15A-1340.16(d)(11).

Appeal by defendant from judgment entered 17 July 1996 by Judge Thomas W. Seay, Jr. in Rowan County Superior Court. Heard in the Court of Appeals 19 August 1997.

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[127 N.C. App. 536 (1997)]

Attorney General Michael F. Easley, by Assistant Attorney General H. Alan Pell, for the State.

Inge, Doran & Shelby, P.A., by Robert L. Inge, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Defendant Andy Lamont Deese appeals from his conviction of second degree murder and his sentence to an aggravated term of imprisonment. For the reasons set forth below, we ascertain no error at trial but remand for a new sentencing hearing consistent with this opinion.

At trial, the evidence tended to show the following: On 4 December 1995, defendant shot and killed Owen Leviner, Sr. following a long, tempestuous landlord-tenant dispute. Leviner was the seventy-three-year-old owner of an eight-unit apartment complex in Salisbury, North Carolina, in which defendant resided. A few months prior to the shooting, Leviner obtained a judgment evicting defendant and two other tenants, which they appealed. While their appeal was pending, however, Leviner informed all of his tenants that he was closing the complex for repairs on 1 December 1995. He directed them to vacate their apartments by that date, because he was having all of the utilities disconnected.

On the morning of 4 December 1995, Leviner drove to the well house in front of defendant's apartment to check the water meter. The seal on the meter had been broken and the water had been reconnected. Defendant was still residing in his apartment and heard Leviner at the meter. Defendant went out onto the front porch to confront Leviner, and as they had many times previously, the two men began to quarrel. The argument intensified, and Leviner threatened to "beat [defendant's] ass" with a metal cane. As Leviner approached the porch, defendant ran into the apartment to retrieve a twelve-gauge shotgun.

The shotgun was loaded and was located inside the apartment, approximately eighteen and one-half feet from the front door. By the time defendant returned to the porch, Leviner had begun to walk toward his car. Defendant shouted at him, "Now threaten me!" Leviner turned around, the argument resumed, and he again advanced toward defendant with the cane raised to strike. As Leviner approached, defendant backed away. Then, when the distance

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between them closed to approximately three feet, defendant raised the shotgun, cocked it, and fatally shot Leviner in the chest.

At the sentencing hearing, the trial court found one aggravating and no mitigating factors and determined that defendant's prior record level was Level II. Hence, the court sentenced defendant to a term of imprisonment of not less than 237 months and not more than 294 months, which exceeded the presumptive range. Defendant appeals.

On appeal, defendant contends that the court erred as follows: (1) in failing to instruct the jury that a cane is a deadly weapon; (2) in failing to instruct the jury that "if a person is attacked in their [sic] own dwelling, home, place of business, or on his own premises, and is also free from fault in bringing on the difficulty, that he is under no duty to retreat, whether the assailant is employing deadly or non-deadly force"; (3) in failing to find that defendant acted under strong provocation as a factor in mitigation of his sentence; and (4) in finding that the victim's elderly age was a factor in aggravation of defendant's sentence. We now address these arguments in order.

[1] By his first and second assignments of error, defendant challenges the trial court's charge to the jury. Pursuant to Rule 9(a)(3)(f) of the North Carolina Rules of Appellate Procedure, "[t]he record on appeal in criminal actions shall contain: . . . where error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given." N.C.R. App. P. 9(a)(3)(f); *see also* N.C.R. App. P. 9(c). "A reviewing court will not consider alleged errors in selected portions of a charge when the entire charge is not before it." *State v. Harrell*, 50 N.C. App. 531, 535, 274 S.E.2d 353, 355-56 (1981) (citing *State v. Young*, 11 N.C. App. 145, 180 S.E.2d 322 (1971)). In the present case, the record does not contain a transcript of the entire jury charge. In fact, no part of the court's instructions is included in the record. Therefore, we are unable to determine whether when taken as a contextual whole, the instructions given to the jury fairly and accurately set forth the essential elements of the offenses and defenses warranted by the evidence. *See State v. Batts*, 303 N.C. 155, 162, 277 S.E.2d 385, 390 (1981). Consequently, these assignments of error are overruled.

[2] Next, defendant contends that the trial court erred in failing to find any factor in mitigation of his sentence. Notably, defendant did not offer any evidence at the sentencing hearing, nor did he urge the court to consider a particular mitigating factor. Still, on appeal, defendant argues that the evidence presented at trial pertaining to

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the circumstances of the shooting compel a finding that he acted under strong provocation. We cannot agree.

In imposing a prison term, the sentencing court must consider any aggravating and mitigating factors that are proved by a preponderance of the evidence. N.C. Gen. Stat. § 15A-1340.16(a) (Cum. Supp. 1996). A defendant who seeks a sentence in the mitigated range bears the burden of persuading the court that mitigating factors exist. *State v. Jones*, 309 N.C. 214, 219, 306 S.E.2d 451, 455 (1983). Thus, where the defendant contends that the trial court erred in failing to find a mitigating factor established by uncontradicted evidence, his position is analogous to that of a party seeking a directed verdict. *Id.* In other words, “[h]e is asking the court to conclude that ‘the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,’ and that the credibility of the evidence ‘is manifest as a matter of law.’” *Id.* at 219-20, 306 S.E.2d at 455.

If the defendant definitively proves that he acted under circumstances constituting strong provocation, the trial court must consider this factor in mitigation of his or her sentence. N.C.G.S. § 15A-1340.16 (e)(8). “The legislature has provided this statutory mitigating factor to reduce a defendant’s culpability when circumstances exist that ‘morally shift part of the fault for a crime from the criminal to the victim.’” *State v. Canty*, 321 N.C. 520, 525, 364 S.E.2d 410, 414 (1988) (quoting *State v. Martin*, 68 N.C. App. 272, 276, 314 S.E.2d 805, 807 (1984)). Hence, evidence tending to show that the victim threatened or challenged the defendant is relevant in determining the existence of provocation. *State v. Faison*, 90 N.C. App. 237, 368 S.E.2d 28 (1988); See *State v. Braswell*, 78 N.C. App. 498, 337 S.E.2d 637 (1985). However, the court is not obliged to find provocation when the defendant had time or opportunity to “cool his blood.” *State v. Foster*, 101 N.C. App. 153, 159, 398 S.E.2d 664, 668 (1990). For instance, in *State v. Highsmith*, 74 N.C. App. 96, 327 S.E.2d 628, *disc. review denied*, 314 N.C. 119, 332 S.E.2d 486 (1985), this Court found no error in the trial court’s failure to consider the mitigating factor of strong provocation, stating that,

returning to the vicinity of the original fight manifest[s] actions more consistent with a prior determination to seek out a confrontation rather than a state of passion without time to cool placing defendant beyond control of his reason.

Id. at 100-01, 327 S.E.2d at 631; see also *Faison*, 90 N.C. App. 237, 368 S.E.2d 28 (holding that evidence failed to establish strong provoca-

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tion where after the original altercation, defendant left the building, walked to his car to obtain a rifle, and then returned to the building to shoot the victim).

In the instant action, the evidence showed that after the initial confrontation with Leviner, defendant went inside his apartment and retrieved his shotgun, having covered a total distance of approximately thirty-seven feet before he returned to the front porch. Additionally, Leviner had apparently abandoned the confrontation when defendant challenged him to resume his threats. Inasmuch as it was defendant who provoked the final face-off resulting in Leviner's death, we ascertain no error in the trial court's failure to consider the mitigating factor of strong provocation.

[3] With his final assignment, defendant argues that the trial court erred in finding as an aggravating factor that the victim was "very old." We agree.

When a defendant assigns error to the sentence imposed by the trial court, our standard of review is "whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing." N.C. Gen. Stat. § 15A-1444(a1) (Cum. Supp. 1996). Under the Fair Sentencing Act, the trial court may find as a factor in aggravation of the defendant's sentence that "[t]he victim was very young, or very old, or mentally or physically infirm." N.C.G.S. § 15A-1340.16 (d)(11). The policy underlying this aggravating factor is to deter wrongdoers from taking advantage of a victim because of his age or mental or physical infirmity. *State v. Rios*, 322 N.C. 596, 599, 369 S.E.2d 576, 578 (1988).

"There are at least two ways in which a defendant may take advantage of the age of his victim. First, he may 'target' the victim because of the victim's age, knowing that his chances of success are greater where the victim is very young or very old. Or the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend himself. In either case, the defendant's culpability is increased."

Id. (quoting *State v. Thompson*, 318 N.C. 395, 398, 348 S.E.2d 798, 800 (1986)). Clearly, vulnerability due to the victim's age is the concern addressed by this aggravating factor. *State v. Ahearn*, 307 N.C. 584, 603, 300 S.E.2d 689, 701 (1983). Thus, the issue before the trial court

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must be whether the victim, by reason of his years, was more vulnerable to the assault committed against him than he otherwise would have been. As our Supreme Court explained in *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985),

Age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already is as a result of committing a violent crime against another person. A victim's age does not make a defendant more blameworthy unless the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her, as where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized. Unless age has such an effect, it is not an aggravating factor under the Fair Sentencing Act.

Id. at 525, 335 S.E.2d at 8 (citations omitted).

At the sentencing hearing, the prosecution asked the court, based on the fact that Leviner was seventy-three years of age, to find the statutory aggravating factor that the victim was very old. Leviner's age, however, by itself, does not establish that he was more vulnerable to being mortally wounded by a twelve-gauge shot gun than a younger person would have been. *See Id.* at 526, 335 S.E.2d at 8. Furthermore, although there was evidence offered at trial that, due to neck injuries sustained in an automobile accident, Leviner occasionally used a walking cane, "that disability was not age-related." *Id.* Thus, since the record is devoid of any evidence suggesting that defendant took advantage of Leviner's advanced years, we determine that the trial court erred in finding this aggravating factor. Hence, we remand this matter for resentencing.

For the foregoing reasons, this case is remanded to the superior court for a new sentencing hearing to be conducted consistent with this opinion.

Remanded for a new sentencing hearing.

Judges EAGLES and MARTIN, John C., concur.

TAYLOR v. CALDWELL SYSTEMS, INC.

[127 N.C. App. 542 (1997)]

(I.C. No. 107316) GLENN RAY TAYLOR, EMPLOYEE, PLAINTIFF-APPELLEE, CALDWELL SYSTEMS, INC., EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS; AND/OR (I.C. No. 260953) AUTUMN HOUSE, EMPLOYER, DEFENDANT; AND/OR SELF-INSURED (AEGIS ADMINISTRATIVE SERVICES, ADJUSTING AGENCY), CARRIER, DEFENDANT; AND/OR CIGNA INSURANCE COMPANY, CARRIER, DEFENDANT; (**Now, all dismissed as defendants**) AND/OR (I.C. No. 260956) DAVIS WOOD PRODUCTS, EMPLOYER, RELIANCE INSURANCE COMPANY, CARRIER, DEFENDANTS-APPELLANTS; AND/OR SELF-INSURED (AEGIS ADMINISTRATIVE SERVICES, ADJUSTING AGENCY), CARRIER, DEFENDANT-APPELLANT

No. COA96-763

(Filed 21 October 1997)

Workers' Compensation § 414 (NCI4th)— Industrial Commission—reversal of deputy commissioner—cold record—no reference to credibility of witnesses—abuse of discretion

The Industrial Commission abused its discretion by reversing a deputy commissioner on a cold record without making any reference to the credibility of witnesses and in no way demonstrating due consideration to the general rule that the hearing officer, as a firsthand observer, is the best judge of the credibility of witnesses.

Appeal by defendants Caldwell Systems, Inc., Liberty Mutual Insurance Company, Davis Wood Products, Reliance Insurance Company and Aegis Administrative Services from opinion and award filed 16 February 1996 by the Full Industrial Commission. Heard in the Court of Appeals 18 August 1997.

Plaintiff was employed by defendant Caldwell Systems, Inc. (Caldwell), a hazardous waste storage and incineration facility, from 12 August 1981 to 15 December 1985. Initially, plaintiff was hired as a "sludge worker." His duties included pouring toxic sludge waste from one drum to another, cleaning tanks, shoveling or throwing toxic wastes into the resin tank, pumping wastes out of drums or tankers and cleaning out various holding tanks.

Prior to the institution of a safety program in late 1983 or early 1984, plaintiff and other employees experienced severe headaches, nausea, vomiting, rashes, light headedness and watery eyes. Throughout the workday, toxic waste material splashed or spilled on plaintiff's skin and clothing while he performed the duties of his

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employment. Plaintiff and other employees also breathed noxious fumes that permeated the hazardous waste facility.

In September 1983, plaintiff was involved in a major accident while working at Caldwell. The entire contents of a 55-gallon drum of styrene fell and poured over plaintiff's shirtless body. The gluey styrene stuck to plaintiff's skin, causing him to feel burning all over his body and to have difficulty breathing. Plaintiff screamed in pain and eventually lost consciousness. Plaintiff was treated at the emergency room, released and, later the same day, after experiencing a seizure-like episode, was readmitted and hospitalized for several days.

Plaintiff continued working at Caldwell until 15 December 1985, when he was terminated. On 9 May 1989, plaintiff began working as a press operator for Davis Wood Products, a manufacturer of molded plywood for the furniture industry. Plaintiff was unable to perform the job of press operator satisfactorily and was transferred after four to five weeks to work in "clean up." As part of the job, plaintiff visited the glue room three or four times a day. During the last three months of his employment at Davis Wood Products, he worked continually in the glue room, where he was exposed to irritating fumes from urea formaldehyde glue. Plaintiff was terminated by Davis Wood Products on 30 April 1990.

Plaintiff contends that he suffers from progressive chronic toxic encephalopathy, a neurological disorder, that began as a result of his extensive exposure to toxic chemicals at Caldwell and that became worse as a result of his exposure to chemicals at Davis Wood Products. He further contends that he suffers from post-traumatic-stress disorder as a result of the September 1983 accident at Caldwell in which a drum of styrene spilled on him.

Plaintiff filed a claim for workers' compensation benefits, and the case was first heard before Deputy Commissioner Morgan S. Chapman on 24 and 25 June 1992 with Caldwell and Liberty Mutual Insurance Company as named defendants. Autumn House and Davis Wood Products were subsequently added as defendants and a second hearing was held on 17 and 18 March 1993.

The record in this case includes opinions from five doctors, who gave varying assessments of plaintiff's condition as to chronic toxic encephalopathy and post-traumatic-stress disorder.

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On 27 June 1994, Deputy Commissioner Chapman issued an opinion and award concluding that plaintiff had not proven that he developed an occupational disease and denying benefits under the Workers' Compensation Act. Plaintiff appealed to the Full Commission.

On 16 February 1996, the Industrial Commission filed an opinion and award reversing the Deputy Commissioner and concluding that plaintiff had been totally disabled from the occupational diseases chronic toxic encephalopathy and post-traumatic-stress disorder since July 1990. The Commission further concluded that the diseases were caused by exposure to chemicals and fumes at Caldwell and that plaintiff was last injuriously exposed to the hazards of such diseases while working for defendant Davis Wood Products from February to April 1990. The Commission concluded that defendant Davis Wood Products is liable for disability and medical compensation awarded to plaintiff.

The Commission also concluded that plaintiff's injury was caused by the willful failure of Caldwell to comply with occupational safety and health standards or regulations promulgated pursuant to the Occupational Safety and Health Act of North Carolina. Pursuant to N.C. Gen. Stat. § 97-12 (1991), the Commission assessed a penalty against Caldwell equal to 10 percent of the compensation awarded. Defendants Caldwell, Liberty Mutual Insurance Company, Davis Wood Products, Reliance Insurance Company and Aegis Administrative Services appeal.

Patterson, Harkavy & Lawrence, L.L.P., by Donnell Van Noppen III, for plaintiff appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by J.A. Gardner, III, and Jennifer Ingram Mitchell, for defendant appellants Caldwell Systems, Inc., and Liberty Mutual Insurance Company.

Orbock Bowden Ruark & Dillard, P.C., by Barbara E. Ruark, for defendant appellants Davis Wood Products and Reliance Insurance Company.

Golding Meekins Holden Cospers & Stiles, L.L.P., by Henry C. Bynum, Jr., for defendant appellants Davis Wood Products and Aegis Administrative Services.

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ARNOLD, Chief Judge.

Upon review of this record, we find that the Industrial Commission improperly reversed the decision of the Deputy Commissioner.

We recognize the well-established rule that the Industrial Commission has authority to review a decision of a Deputy Commissioner and, where appropriate, to amend the opinion and award. N.C. Gen. Stat. § 97-85 (1991). "These powers are 'plenary powers to be exercised in the sound discretion of the Commission' and should not be reviewed on appeal absent a manifest abuse of discretion." *Sanders v. Broyhill Furniture Industries*, 124 N.C. App. 637, 639, 478 S.E.2d 223, 225 (1996) (citation omitted), *disc. review denied*, 346 N.C. 180, 486 S.E.2d 208 (1997). "Ordinarily, the Full Commission is the sole judge of the credibility of witnesses." *Id.* (citations omitted). In cases such as this one, however, where the Full Commission reviews a cold record and does not conduct its own hearing, "this Court has recognized the general rule that 'the hearing officer is the best judge of the credibility of witnesses because he is a firsthand observer of witnesses whose testimony he must weigh and accept or reject.'" *Id.* (citation omitted). "[W]hen the Commission reviews a deputy commissioner's credibility determination on a cold record and reverses it without considering that the hearing officer may have been in a better position to make such an observation, it has committed a manifest abuse of its discretion." *Sanders*, 124 N.C. App. at 639-40, 478 S.E.2d 223, 225. Accordingly, this Court has held that "prior to reversing the deputy commissioner's credibility findings on review of a cold record, the full Commission must . . . demonstrate in its opinion that it considered the applicability of the general rule [that] encourages deference to the hearing officer[,] who is the best judge of credibility." *Sanders*, 124 N.C. App. at 640, 478 S.E.2d 223, 225.

Here, the Full Commission's opinion makes no reference at all to the credibility of witnesses. It in no way demonstrates that the Commission gave due consideration to the general rule that the hearing officer, as a firsthand observer, is the best judge of the credibility of witnesses. In reversing the Deputy Commissioner without addressing these matters, the Commission abused its discretion. For this reason, we reverse the opinion and award of the full Industrial Commission and remand to the Commission for consideration of the Deputy Commissioner's findings of credibility.

ONslow COUNTY v. MOORE

[127 N.C. App. 546 (1997)]

Reversed and remanded.

Judges WALKER and SMITH concur.

ONslow COUNTY, APPELLEE-PLAINTIFF v. GENE MOORE, APPELLANT-DEFENDANT

KIMBERLY McKILLOP, APPELLANT-PLAINTIFF v. ONslow COUNTY, APPELLEE-DEFENDANT

PATRICIA TREANTS, APPELLANT-PLAINTIFF, v. ONslow COUNTY, APPELLEE-DEFENDANT

No. COA97-32

No. COA97-33

No. COA97-35

(Filed 21 October 1997)

Appeal and Error § 372 (NCI4th)— settled record—time for serving—extension of time by trial court—ineffective—appeal dismissed

Appeals were dismissed where appellant filed notices of appeal and served proposed records on appeal on 3 July 1996; the County filed its notice of appeal on 30 July 1996; giving the parties the benefit of the doubt, appellants' records should have been settled by the end of September and the County's by mid-November; each appeal contains an order from a trial judge granting appellants' motions to extend time; and the settled records on appeal were served on the County on 7 January 1997. All motions made to extend time other than for service of the proposed record on appeal and to produce the transcript must be made to the court to which appeal has been taken. The appeals are dismissed here because the trial court's purported extension of time to file the records on appeal was ineffective and the records were not filed within the times mandated by the Rules of Appellate Procedure. N.C.R. App. P. 11(c); N.C.R. App. P. 27(c)(1).

Appeal by defendant in No. 95 CvS 2836 from order entered 3 July 1996 by Judge W. Allen Cobb, Jr., in Onslow County Superior Court. Appeal by plaintiff and defendant in No. 94 CvS 1980 from judgment entered 3 July 1996 by Judge W. Allen Cobb, Jr., in Onslow County Superior Court. Appeal by plaintiff and defendant in No. 94 CvS 1981

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from judgment entered 3 July 1996 by Judge W. Allen Cobb, Jr., in Onslow County Superior Court. Heard in the Court of Appeals 16 September 1997.

Jeffrey S. Miller for appellants Moore, McKillop and Treants.

Shipman & Associates, L.L.P., by Gary K. Shipman, Carl W. Thurman, III, and C. Wes Hodges, II, for appellee Onslow County.

SMITH, Judge.

Appellants Gene Moore, Kimberly McKillop, and Patricia Treants (collectively "appellants") each own businesses alleged to be in violation of an ordinance of appellee Onslow County ("the County") entitled "Ordinance to Regulate Adult Businesses and Sexually Oriented Businesses in Onslow County, NC." ("the ordinance"). In No. 95 CvS 2836, the County filed an action against Moore seeking injunctive relief ordering him to comply with the ordinance. Moore appeals an order finding him in contempt of a preliminary injunction entered 26 March 1996. McKillop and Treants filed separate actions against the County seeking a declaration that the ordinance was invalid and unconstitutional. McKillop and Treants appeal judgments dismissing their claims with prejudice and permanently enjoining them from violating the ordinance. The County also appeals from the portion of the judgments declaring the ordinance partially preempted by N.C. Gen. Stat. § 14-202.11 (1993). This Court, upon its own initiative, has consolidated the appeals in these cases due to the common questions presented.

We take this opportunity to remind our colleagues in the bar and on the bench that our Rules of Appellate Procedure are mandatory and violations thereof subject an appeal to dismissal. *Adams v. Kelly Springfield Tire Co.*, 123 N.C. App. 681, 682, 474 S.E.2d 793, 794 (1996). Each appellant in the instant cases, including the County, has failed to comply with the Rules of Appellate Procedure and their appeals are dismissed.

N.C.R. App. P. 11(c) states that

[w]ithin 21 days . . . after service upon him of appellant's proposed record on appeal, an appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. . . .

ON SLOW COUNTY v. MOORE

[127 N.C. App. 546 (1997)]

If any appellee timely files amendments, objections, or a proposed alternative record on appeal, the appellant or any other appellee, within 10 days after expiration of the time within which the appellee last served might have filed, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal.

N.C.R. App. P. 11(c) further states that a hearing shall be held to settle the record on appeal no later than 15 days after service of the request for hearing upon the trial court, and the trial court shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing.

Here, appellants filed notices of appeal and served proposed records on appeal in their respective actions on 3 July 1996. The County filed its notice of appeal on 30 July 1996. Giving the parties the benefit of every doubt, appellants records on appeal should have been settled, judicially or otherwise, by the end of September 1996. The County's record on appeal should have been settled judicially or otherwise by mid-November 1996. While the records are devoid of any documentation showing judicial settlement of the records on appeal, each appeal contains an order entered by Judge James R. Strickland on 6 January 1997 granting appellants' motions to extend the time to file the settled records on appeal until 16 January 1997. No other extension of time appears in the records on appeal. The records also show that the settled records on appeal were served on the County on 7 January 1997.

According to N.C.R. App. P. 27(c)(1), for good cause shown by an appellant, the trial court may extend once for no more than 30 days the time permitted by N.C.R. App. P. 11 or Rule 18 for service of the proposed record on appeal. N.C.R. App. P. 27(c)(2) states "[a]ll motions for extensions of time other than those specifically enumerated in rule 27(c)(1) may only be made to the appellate court to which appeal has been taken." Thus, all motions made to extend time, except for motions to extend the time for service of the proposed record on appeal under N.C.R. App. P. 27(c)(1), and motions to extend the time to produce the transcript under N.C.R. App. P. 7(b)(1), must be made to the court to which appeal has been taken. For this reason, appellants should have directed their motions to extend the time to file the settled records on appeal to this Court. Because the trial court's purported extension of time to file the records on appeal was ineffective, and because the records on appeal

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were not filed within the times mandated by the Rules of Appellate Procedure, each parties' appeals are dismissed.

In No. 95 CvS 2836, defendant Gene Moore's appeal is dismissed. In No. 94 CvS 1980, plaintiff McKillop's appeal and the County's appeal is dismissed. In No. 94 CvS 1981, plaintiff Treants' appeal and the County's appeal is dismissed. In No. 95 CvS 2836, the costs of the appeal are taxed to defendant. In Nos. 94 CvS 1980 and 94 CvS 1981, each party is taxed one-half the costs of the appeal.

Appeals dismissed.

Judges WYNN and WALKER concur.

STATE OF NORTH CAROLINA v. DERRICK ALONZO WILLIS

No. COA96-1519

(Filed 21 October 1997)

1. Robbery § 70 (NCI4th)— armed robbery—no evidence of ownership of property—evidence of possession sufficient

The trial court did not err in an armed robbery prosecution by not granting defendant's motion for a directed verdict where Floyd Burnette was in his mobile home with his fiancée when a man with a shotgun entered the home; the man asked where the drugs were; Burnette told the man he didn't know what he was talking about; the man took eight or ten dollars from him; defendant and another man entered the home; and defendant went to the bedroom of Burnette's brother, returning immediately with a VCR and a black case. There was substantial evidence of each element of armed robbery, even though defendant contended that there was no evidence of ownership of the VCR and black case, because there was undisputed evidence that these items were taken by defendant from Burnette's possession while Burnette was present and being threatened with a shotgun. It is the taking of personal property from another with force or putting that person in fear that is the gist of the offense and the ownership of the property taken is not relevant.

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2. Robbery § 5 (NCI4th)— armed robbery—property promised for drugs

An armed robbery defendant's argument that he had a legitimate interest in items taken at the point of a shotgun because the owner had agreed to give them to defendant in exchange for drugs and that defendant therefore could not be guilty of robbery was rejected; adoption of the proposition would be but one step short of allowing lawless reprisal to become an acceptable means of redressing grievances.

Appeal by defendant from judgment dated 8 February 1996 by Judge Ronald E. Bogle in Buncombe County Superior Court. Heard in the Court of Appeals 17 September 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Teresa L. White, for the State.

Pitts, Hay, Hugenschmidt & Devereux, P.A., by Sean P. Devereux, for defendant appellant.

GREENE, Judge.

Derrick Alonzo Willis (defendant) appeals from a judgment sentencing him to a term of imprisonment of not less than 45 months and not more than 63 months. The judgment was based on a jury verdict finding the defendant guilty of armed robbery and conspiracy to commit armed robbery.

The evidence tends to show that on 17 November 1994, Floyd Burnette (Mr. Burnette) was in his mobile home with his fiancée, Kimberly Hardin (Ms. Hardin), when a black male carrying a shotgun entered the trailer. Mr. Burnette shared the mobile home with his brother, Adrian Burnette. Once inside, the black male asked Mr. Burnette "where the drugs were." Mr. Burnette testified that after he told the black male he did not know what the black male was talking about, the black male took eight or ten dollars from him. Two other men then came into the mobile home. One stood next to Ms. Hardin, while the other, the defendant, went straight to Adrian Burnette's bedroom and immediately came out with a video cassette recorder (VCR) and a black case. Mr. Burnette did not give the men permission to come into his home, to take the VCR nor the money.

George Sprinkle (Sprinkle), a detective with the Buncombe County Sheriff's Department, took written statements from Marvin

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Gray, Kevin Wooten, and Jye Littlejohn, each of whom implicated the defendant. Sprinkle also took a written statement from the defendant who admitted that he had gone into the mobile home with Marvin Gray and Kevin Wooten while Jye Littlejohn stayed in the car. The defendant further admitted that he went into the bedroom and “got the stuff from under the mattress” because Mr. Littlejohn had told him that the “stuff” was under the mattress. Evidence indicated that Mr. Littlejohn had been in the mobile home the night before the robbery to purchase drugs. The State introduced the written statement (which was signed by the defendant) into evidence. At the end of the State’s evidence, the defendant moved for a directed verdict on the basis that the State did not make a “clear [and] convincing case for the jury” This motion was denied by the trial court. The defendant presented no evidence.

The dispositive issue is whether the absence of any evidence as to the ownership of the VCR and black case requires dismissal of the armed robbery charges.

[1] Armed robbery has the following essential elements: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; (3) whereby the life of a person is endangered or threatened. *State v. Faison*, 330 N.C. 347, 358, 411 S.E.2d 143, 149 (1991). *See also*, N.C.G.S. § 14-87 (1993). The defendant contends that implicit in the first element is the requirement that the property taken must belong to the person from whom it is taken. We disagree. It is the taking of personal property from another with force or putting that person in fear that is the gist of this offense and the ownership of the property taken is not relevant. *State v. Spillars*, 280 N.C. 341, 345, 185 S.E.2d 881, 884 (1972). Indeed the State need only show that the property taken was in the “care, custody, control, management, or possession” of the person from whom it was taken. *State v. Mason*, 279 N.C. 435, 440-41, 183 S.E.2d 661, 664 (1971) (quoting *State v. Lynch*, 266 N.C. 584, 586, 146 S.E.2d 677, 679 (1996)).

In this case there is no evidence as to the ownership of the VCR and the black case. There is undisputed evidence, however, that these items were taken by the defendant from Mr. Burnette’s possession (from his residence) while Mr. Burnette was present and being threatened with a shotgun. This evidence is sufficient to support a conclusion that the VCR and black case were taken from the presence of Mr.

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Burnette by the threatened use of a firearm and that the life of Mr. Burnette was endangered. Accordingly, there exists substantial evidence of each element of the offense of armed robbery and the trial court correctly denied the defendant's motion to dismiss the charges. See *State v. Smith*, 300 N.C. 71, 78-9, 265 S.E.2d 164, 169 (1980).

[2] In so holding we also reject the related argument of the defendant that he has a legitimate ownership interest in the VCR and black case because Adrian Burnette agreed to give him these items in exchange for a drug purchase and that because of that interest he cannot be guilty of robbery. Our Supreme Court has held that “[a] defendant is not guilty of robbery if he forcibly takes personal property from the actual possession of another under a bona fide claim of right or title to the property” *State v. Spratt*, 265 N.C. 524, 526-27, 144 S.E.2d 569, 571 (1965). Other jurisdictions have rejected this proposition and noted that this type of self-help is incompatible with an ordered and civilized society. See Kristine Cordier Karnezis, Annotation, *Robbery, Attempted Robbery, or Assault to Commit Robbery, as Affected by Intent to Collect or Secure Debt or Claim*, 88 A.L.R.3d 1309, 1314 (1978). Adoption of the proposition would be but one step short of allowing lawless reprisal to become an acceptable means of redressing grievances. *Id.* Indeed, in 1978 this Court rejected the defendant's claim that he could not be guilty of armed robbery because of his good faith belief that he had an ownership interest in the property taken. *State v. Oxner*, 37 N.C. App. 600, 604, 246 S.E.2d 546, 548 (1978) (“We renounce the notions that force be substituted for voluntary consent and violence be substituted for due process of law.”), *judgment aff'd without precedential value*, 297 N.C. 44, 252 S.E.2d 705 (1979). Although that decision was affirmed by our Supreme Court, it was without precedential value because the justices were evenly split on the issue (with one justice recusing himself). *State v. Oxner*, 297 N.C. 44, 46-7, 252 S.E.2d 705, 706 (1979). Assuming the continued viability of *State v. Spratt*, however, the evidence in this case simply does not support the defendant's claim that he took the VCR and black case with a good faith belief that he was the lawful owner of those items.

We have carefully examined the defendant's other assignments of error and overrule them without discussion.

No Error.

Judges JOHN and TIMMONS-GOODSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 16 SEPTEMBER 1997

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| BAREFOOT v. CHAPEL HILL REALTY No. 96-1037 | Orange (92CVS1499) | Affirmed |
| BROWN v. PARKER No. 97-260 | Guilford (96CVS5709) | Affirmed |
| CARPENTER v. SPARTAN FOOD SYSTEMS No. 96-1497 | Ind. Comm. (761867) | Affirmed |
| DARDEN v. HARRELL No. 96-1537 | Dare (96CVS325) | Affirmed and Remanded |
| GRANT v. KING MACHINE OF N.C. No. 97-36 | Ind. Comm. (117507) | Affirmed |
| HARRIS v. MANPOWER TEMPORARY SERVICES No. 96-1092 | Ind. Comm. (413294) | Affirmed |
| HAYWOOD v. HAYWOOD No. 96-1229 | Durham (85CVD1681) | Affirmed |
| HEMRIC HOUSE v. FIRST UNION NAT. BANK No. 96-1309 | Yadkin (96CVS5) | Dismissed |
| IN RE DBA AND PJT No. 96-858 | Durham (96J156) (96J160) | Appeal Dismissed |
| PARSONS v. K-MART No. 96-1429 | Ind. Comm. (387032) | Affirmed |
| PILAND v. HARRIS SUPERMARKET No. 96-1197 | Ind. Comm. (159867) | Affirmed |
| SMITH v. BERRY No. 96-1474 | Robeson (93CVS2426) | Affirmed |
| STATE v. ADAMS No. 97-265 | Graham (96CRS792) | No Error |
| STATE v. BEASLEY No. 97-91 | Forsyth (96CRS9886) | Affirmed |
| STATE v. BRYANT No. 97-62 | Wake (95CRS103086) | No Error |

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| STATE v BULLARD No. 96-1363 | New Hanover (95CRS20501) (95CRS20502) (95CRS20503) (95CRS520) | No Error |
| STATE v. CASTILLO No. 97-278 | Forsyth (96CRS9884) | Affirmed |
| STATE v. FRYE No. 97-145 | Gaston (96CRS6979) | No Error |
| STATE v. HARRIS No. 97-88 | Buncombe (93CRS60390) (93CRS61171) | No Error |
| STATE v. HILL No. 97-1 | Onslow (95CRS23812) | No Error |
| STATE v. JONES No. 97-50 | Wayne (94CRS10785) | No Error |
| STATE v. KILPATRICK No. 96-1398 | Guilford (94CRS73015) | No Error |
| STATE v. LANE No. 97-133 | Beaufort (96CRS492) (96CRS1420) | No Error |
| STATE v. PACK No. 97-184 | Iredell (94CRS2233) (94CRS2234) (94CRS2235) (94CRS2236) | No Error |
| STATE v. REVEAL No. 97-107 | Halifax (94CRS8882) | No Error |
| STATE v. SMITH No. 97-258 | Lenoir (96CRS1368) | No Error |
| STATE v. SPEARMAN No. 96-1188 | Edgecombe (94CRS3820) (94CRS3821) | No Error |
| STATE v. STEWART No. 96-767 | Wake (95CRS432) | No Error |
| STATE v. TURNER No. 97-169 | Wake (95CRS45710) (95CRS45711) (95CRS45712) | No Error |
| STATE ex rel. CHANDLER v. BRADLEY No. 97-187 | Harnett (94CVD669) | Vacated and Remanded |

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| TOWNES v. MILLS No. 96-1529 | Orange (94CVS1727) | Affirmed |
| WHITTED v. POTEAT No. 96-1367 | Orange (84CVD345) | Reversed and Remanded |

FILED 7 OCTOBER 1997

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| BELL v. BELL No. 96-951 | Guilford (96CVD2826) | Reversed and Remanded for New Trial |
| BERTIE-HERTFORD CHILD SUPP. ENF. ex rel. SPELLER v. BOND No. 96-1536 | Bertie (93CVD241) | Reversed |
| BISSETT v. DOE No. 96-1459 | Nash (91CVS1469) | Affirmed in part Reversed in part |
| BROWN v. DON PLOTKINS HOME CENTER No. 96-1511 | Ind. Comm. (104809) | Reversed and Remanded |
| CAUDILL v. CAUDILL No. 96-1258 | Iredell (93CVD1876) | Vacated and Remanded |
| EARLY v. KOEHLER No. 96-1454 | Forsyth (96CVS2354) | Reversed and Remanded |
| GIBBS v. LACKAWANNA LEATHER CO. No. 97-300 | Ind. Comm. (385398) | Affirmed |
| GRAINGER v. FREIBERGER ARCHITECTURAL SERVICES No. 97-375 | Ind. Comm. (242630) | Affirmed |
| GRIFFITH v. JOSEY No. 96-1356 | Iredell (95CVS1306) | Affirmed in part; Reversed in part and Remanded |
| JEFFREYS v. FOWLER No. 96-1494 | Wake (96CVS10040) | Affirmed |
| KNIGHT v. DEPT. OF HUMAN RESOURCES No. 97-291 | Wake (95CVS12503) | Affirmed |
| LIGGETT GROUP v. SUNAS No. 96-1251 | Durham (89CVS2333) | No Error |

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| LLOYD v. JONES No. 96-957 | Ind. Comm. (267664) | Affirmed |
| MARTIN v. WHISNANT No. 97-20 | Catawba (94CVS2789) | Affirmed |
| McNAIR v. SUPERIOR CONSTRUCTION CO. No. 97-157 | Ind. Comm. (248030) | Affirmed |
| MOORE v. COHN No. 96-1431 | Wilkes (95CVS987) | Affirmed |
| SMITH v. MORGAN No. 96-1449 | Moore (95CVS85) | Reversed and Remanded |
| STATE v. BENNETT No. 97-283 | Cleveland (95CRS4366) (95CRS5386) | No Error |
| STATE v. BOWEN No. 97-310 | Union (95CRS462) | Appeal Dismissed |
| STATE v. BOYD No. 97-331 | Mecklenburg (95CRS25305) (95CRS25310) (95CRS25316) (95CRS45995) | No error in trial. Remanded for correction of judgment. |
| STATE v. BRANSON No. 97-240 | Guilford (94CRS077929) | Affirmed |
| STATE v. BRYSON No. 96-1412 | Haywood (94CRS5194) (94CRS5195) | No Error |
| STATE v. CLEVENGER No. 97-70 | Durham (95CRS27612) (95CRS27613) | No Error |
| STATE v. CRIBB No. 97-167 | Brunswick (95CRS4173) (95CRS4204) (95CRS4205) | No Error |
| STATE v. DUMAS No. 96-394 | Guilford (95CRS0750) (95CRS20017) | New Trial |
| STATE v. FERRELL No. 96-1441 | Wake (95CRS28863) (95CRS28864) | No Error |
| STATE v. GATZON No. 97-369 | Guilford (96CRS46267) | No Error |

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| STATE v. GOODING No. 96-1326 | Guilford (94CRS58294) | No Error |
| STATE v. HOLLOMAN No. 97-372 | Harnett (96CRS1164) (96CRS1165) (96CRS1418) (96CRS1419) | No Error |
| STATE v. HUBBARD No. 96-1427 | Guilford (96CRS25880) (96CRS25881) (96CRS22364) | No Error |
| STATE v. HUDSON No. 95-271-2 | Mecklenburg (93CRS64393) (93CRS64394) (93CRS64395) | Reversed and Remanded |
| STATE v. JORDAN No. 96-1294 | Graham (95CRS402) (95CRS403) (95CRS404) (95CRS405) (95CRS406) (95CRS407) (95CRS408) (95CRS409) (95CRS410) (95CRS411) (95CRS414) (95CRS415) (95CRS416) (95CRS417) (95CRS418) (95CRS419) (95CRS420) (95CRS421) (95CRS422) (95CRS423) (95CRS424) (93CRS941) | No Error |
| STATE v. JORDAN No. 97-142 | Mecklenburg (94CRS85229) | No Error |
| STATE v. KENNEDY No. 97-391 | Forsyth (96CRS3495) | No Error |
| STATE v. LOCKLEAR No. 96-1461 | Hoke (92CRS4245) (92CRS4246) | Affirmed |

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| STATE v. LYTLE No. 97-220 | Buncombe (95CRS57894) (95CRS57895) | Dismissed |
| STATE v. MILANO No. 97-22 | Mecklenburg (94CRS76793) (95CRS8863) (95CRS8865) (95CRS8867) (95CRS8869) (95CRS8872) | No Error |
| STATE v. MORROW No. 96-1029 | Cherokee (94CRS152) (94CRS983) | No Error |
| STATE v. MOSS No. 97-230 | Graham (95CRS710) | No Error |
| STATE v. NIXON No. 97-148 | Union (96CRS6740) | No Error |
| STATE v. OUTLAW No. 97-350 | Bertie (96CRS1953) (96CRS1959) (96CRS1960) | No Error |
| STATE v. OWENBY No. 97-93 | Haywood (95CRS5939) | No Error |
| STATE v. ROBERTSON No. 97-552 | Surry (94CRS6668) (94CRS6669) | No Error |
| STATE v. SANCHEZ No. 96-1284 | Cumberland (95CRS31253) | No Error |
| STATE v. SAUNDERS No. 96-389 | Mecklenburg (94CRS46596) (94CRS49476) (94CRS49478) (94CRS49481) | New trial in Case No. 94CRS49481; No error in Case Nos. 94CRS46596, 94CRS49476, 94CRS49478 |
| STATE v. SEARLES No. 97-218 | Buncombe (95CRS65052) (95CRS10827) | No Error |
| STATE v. SEXTON No. 97-204 | Mecklenburg (94CRS51877) (94CRS51878) (94CRS51879) | No Error |

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| STATE v. SHELTON No. 96-1488 | Rockingham (95CRS11617) (95CRS11618) | New Trial |
| STATE v. SMITH No. 97-222 | Edgecombe (96CRS2160) (96CRS2161) | No Error |
| STATE v. WALL No. 97-111 | Richmond (95CRS866) (95CRS867) (95CRS868) | No Error |
| STATE v. WILLIAMS No. 96-530 | Wayne (94CRS1024) | No Error |
| STATE v. WOLF No. 97-271 | Randolph (92CRS7676) (92CRS7667) (92CRS7668) (92CRS7669) (92CRS7670) (92CRS7671) (92CRS7672) (92CRS7674) (92CRS7675) | No Error |
| TUCKER v. TUCKER No. 96-1232 | Transylvania (96CVD46) | Affirmed |
| UNDERWOOD v. UNDERWOOD No. 96-521 | Iredell (93CVD1760) | Affirm the trial court's order |
| VENABLE v. VENABLE No. 97-80 | Craven (93CVD1015) | Dismissed |
| WIKE v. WIKE No. 97-251 | Caldwell (91CVS1122) | Dismissed |
| WINDERS v. WOMBLE No. 96-1418 | Durham (94CVS3998) | Reverse |
| YOUNG v. LOWMAN No. 97-208 | Catawba (93CVS1833) | No Error |

FILED 21 OCTOBER 1997

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| BEAUFORT COUNTY v. HOLLOWAY No. 96-1274 | Beaufort (79CVD437) | Reversed |
| BOWDEN v. GOFAX No. 96-1209 | Guilford (94CVS9828) | Affirmed |
| BRITT v. BELVIN No. 96-916 | Wake (94CVS09296) | Modified and Affirmed |

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| BROWN v. PARKER No. 97-58 | Guilford (96CVS5709) | Affirmed |
| BRYANT v. BRYANT No. 96-1498 | Rockingham (93CVD57) | Reversed and Remanded |
| BUSINESS TELECOM, INC. v. TELESYSTEMS INT'L No. 97-9 | Wake (96CVS04186) | Affirmed |
| BYRD v. BYRD No. 97-29 | Randolph (92CVD1501) | Affirmed |
| CATO v. HODGES No. 96-1462 | Mecklenburg (96CVS3836) | Dismissed |
| DEANS v. DEANS No. 96-1148 | Mecklenburg (91CVD1730) | Affirmed |
| ESPINOZA v. SHOWELL FARMS No. 96-1406 | Ind. Comm. (364883) | Affirmed |
| GUARD v. GUARD No. 96-1484 | Forsyth (93CVD1585) | Affirmed in part, Reversed in part, and Remanded |
| IN RE ADOPTION OF BYERS No. 96-869 | Harnett (95SP115) (95SP116) (95SP117) (95SP118) (95SP185) (95SP186) (95SP187) (95SP188) | Affirmed |
| IN RE GARRETT CHILDREN No. 96-1383 | Durham (93J74) | Affirmed |
| IN RE HAMPTON No. 97-55 | Catawba (96J65) | Affirmed |
| IN RE HAYES No. 97-368 | Forsyth (91SPC1740) (89SPC0377) | Dismissed |
| IN RE SLAWTER No. 97-141 | Orange (96SPC760) | Affirmed |
| J.R.N., INC. v. RANKIN-PATTERSON OIL CO. No. 97-26 | Buncombe (95CVS80) | Reversed |

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| KASS v. KASS No. 96-1430 | Iredell (95CVD01287) | Vacated in part and Remanded |
| KEMP v. CITY OF REIDSVILLE No. 96-1161 | Rockingham (95CVS649) | No Error |
| MICHAEL WARD, DDS, INC. v. OCEAN REPAIR, INC. No. 97-44 | Buncombe (91CVS2440) | Reversed and Remanded |
| MURPHY v. FLEMING No. 96-1420 | Wilson (95CVS588) | Affirmed |
| PBM GRAPHICS, INC. v. RETIREMENT PUBLISHING, INC. No. 96-1066 | Mecklenburg (95CVS12763) | Reversed and Remanded |
| STATE v. ALLISON No. 96-1453 | Mecklenburg (95CRS37366) (95CRS37367) | No Error |
| STATE v. BEATTY No. 96-1502 | New Hanover (95CRS29963) (95CRS2268) | No Error |
| STATE v. BOWERS No. 97-151 | Halifax (95CRS5999) (95CRS6000) | No Error |
| STATE v. BROWN No. 96-1478 | Bladen (95CRS602) | No Error |
| STATE v. CAPORASSO No. 96-1371 | Randolph (95CRS10075) | No Error |
| STATE v. CARNES No. 96-1345 | Cabarrus (94CRS15291) | No Error |
| STATE v. COVINGTON No. 97-437 | Mecklenburg (96CRS14695) | No Error |
| STATE v. DAVIS No. 96-1410 | New Hanover (95CRS24995) | Affirmed |
| STATE v. DOWDY No. 96-1389 | Guilford (95CR777229) (95CR777230) (95CR777231) (95CR777232) (95CR77734) (95CR77735) (95CR77736) (95CR77746) (95CR77737) | No Error |

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| | (96CR00198) | |
| | (96CR00199) | |
| | (96CR00200) | |
| STATE v. ELLIS No. 96-1451 | Forsyth (95CRS0342) | No Error |
| STATE v. FAIR No. 96-1243 | Forsyth (95CRS31681) (95CRS31682) (95CRS31683) (95CRS31684) (95CRS31685) (95CRS31686) (95CRS31687) (95CRS31688) (95CRS31689) | No Error |
| STATE v. FOX No. 96-1457 | Alexander (95CRS3612) (95CRS3613) (95CRS3614) | No Error |
| STATE v. HAWKINS No. 97-504 | Halifax (95CRS11019) | No Error |
| STATE v. HILL No. 96-1334 | Jones (94CRS828) | No Error |
| STATE v. HINSON No. 96-1475 | Gaston (95CRS26431) | No Error |
| STATE v. HORD No. 96-1332 | Gaston (95CRS26544) | No Error |
| STATE v. HUFFMAN No. 96-1327 | Iredell (94CRS5057) (94CRS5058) | No Error |
| STATE v. JACKSON No. 97-455 | Davidson (96CRS16971) (96CRS16972) | Affirmed |

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| | (96CRS17201) | |
| | (96CRS17202) | |
| | (96CRS17344) | |
| | (96CRS17457) | |
| | (96CRS19309) | |
| STATE v. JOHNSTON No. 96-1468 | Mecklenburg (95CRS078299) | No Error |
| STATE v. LITTLEJOHN No. 96-1512 | Lincoln (94CRS1305) (94CRS1307) (94CRS1580) | No Error |
| STATE v. MOORE No. 96-1151 | Beaufort (94CRS7607) (94CRS7608) | Affirmed |
| STATE v. NIXON No. 96-1499 | New Hanover (92CRS13515) | No Error |
| STATE v. PAGE No. 96-1333 | Cleveland (93CRS3735) (93CRS3736) | No Error |
| STATE v. ROBBINS No. 96-1365 | Guilford (95CRS56571) (95CRS44085) (95CRS56128) | Dismissed |
| STATE v. RUSSELL No. 96-1518 | Gaston (95CRS23386) | No Error |
| STATE v. SKIBINSKI No. 96-1382 | Onslow (96CRS6012) | Vacated |
| STATE v. TURNER No. 97-8 | Gaston (95CRS21765) | No Error |
| STATE v. WARREN No. 96-1391 | Alamance (96CRS12635) (96CRS12636) | No Error |
| STATE v. WATFORD No. 96-1480 | Hertford (96CRS290) | No Error |
| STEVENSON v. STEVENSON No. 96-1522 | Lenoir (95CVD695) | Reversed and Remanded |
| STOCKHAUSEN v. D & R KODDING CO. No. 96-1120 | Guilford (96CVS4382) | Affirmed |
| SYKES v. BATTLE No. 96-1298 | Nash (92CVS1587) | No Error |

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| TOWN OF POLLOCKSVILLE v. JORDAN No. 96-1456 | Jones (91CVS191) | The trial court orders entered 19 May 1992, 4 August 1995, and 6 March 1996 are affirmed. |
| TRINITY GAMES, INC. v. KMS, INC. No. 96-1409 | Gaston (96CVS1456) | Affirmed |
| VANCE COUNTY DSS ex rel. PERRY v. HENDERSON No. 96-1426 | Vance (95CVD581) | New Trial |
| VESS v. VESS No. 97-131 | Cleveland (95CVD1422) | Affirmed in part, Reversed in part, and Remanded |
| WARD v. JOHNSON No. 97-17 | Gaston (96CVD1946) | Affirmed |

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STATE OF NORTH CAROLINA, PLAINTIFF V. SHERMAN WHITE, DEFENDANT

No. COA96-1489

(Filed 4 November 1997)

1. Appeal and Error § 212 (NCI4th)— extension of time for taking appeal—trial court without authority

The trial court exceeded its authority by entering an order extending the time for taking an appeal. N.C. R. App. P. 27(c).

2. Kidnapping and Felonious Restraint § 2 (NCI4th)— continuing offense

The offense of kidnapping under N.C.G.S. § 14-39 is a single continuing offense lasting from the time of the initial unlawful confinement, restraint or removal until the victim regains his or her own free will. Therefore, each place of confinement or each act of asportation occurring during a kidnapping does not constitute a separate unit of prosecution.

3. Kidnapping and Felonious Restraint § 16 (NCI4th)— one act of kidnapping—erroneous submission of three counts

Defendant committed only one act of kidnapping which encompassed the period beginning when a codefendant removed the victim from her vehicle until the victim was released in a motel parking lot, and the trial court improperly submitted three separate counts of kidnapping to the jury, even though sentence was imposed for only one count.

4. Constitutional Law § 200 (NCI4th)— double jeopardy—first-degree kidnapping and underlying sexual assault

Imposition of separate punishments on a defendant for the offenses of first-degree kidnapping and the underlying sexual assault on which the first-degree kidnapping charge was based violates the double jeopardy clauses found in U.S. Const. amend. V and N.C. Const. art. I, § 19.

5. Kidnapping and Felonious Restraint § 14 (NCI4th)— release in safe place

A kidnapping victim was released in a “safe place” at the end of her confinement so that the place of her release could not elevate the crime to first-degree kidnapping where the victim was voluntarily dropped off in a motel parking lot in the middle of the

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afternoon, was given change to make a phone call, and was able to go the motel office to seek assistance.

6. Rape and Allied Sexual Offenses § 27 (NCI4th)— first-degree sexual offense—aiding and abetting—sufficient evidence

The evidence supported defendant's conviction of first-degree sexual offense by aiding and abetting a codefendant's penetration of the victim's vagina with his fingers while in defendant's vehicle where it tended to show that defendant had made a lewd comment to a female restaurant employee just minutes before his vehicle collided with the victim's vehicle; after the collision, the codefendant forced the victim into the back seat of defendant's vehicle; defendant repeatedly reached over the seat while he was driving and hit the victim in the head; both defendant and the codefendant drove the victim from place to place, discussed killing her, and eventually raped her; after the codefendant took the victim to his house, defendant twice visited the house; and both men subsequently removed the victim from the house and released her in a motel parking lot.

Judge WALKER concurring.

Appeal by defendant from judgments entered 16 June 1994 by Judge Catherine C. Eagles in Guilford County Superior Court. Heard in the Court of Appeals 16 September 1997.

Attorney General Michael F. Easley, by Assistant Attorney General Mary D. Winstead, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant appellant.

SMITH, Judge.

The State's evidence tended to show the following: On 14 April 1993, the victim worked the late shift at Bennigan's Restaurant in Greensboro and left the restaurant at approximately 2:30 a.m. on 15 April 1993. While stopped at a traffic light on South Chapman Street, a speeding vehicle approached from the rear and collided with her vehicle. Someone yelled, "[a]re you all right?" and directed her to pull over in order to call the police. After pulling into a parking lot, one of the occupants of the other vehicle, who was later identified as Vernon Easterling ("Easterling"), got out and looked at the damage to both

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vehicles. Easterling approached the victim's vehicle and the victim rolled her window down slightly. He asked if she was all right, and as she turned to look at him, he punched her in the jaw, knocking her into the passenger seat. The next thing she remembered, Easterling was choking her and hitting her head against the passenger seat. The victim attempted to escape through the passenger door, but Easterling pulled her by the hair back into the vehicle, across the console and emergency brake and out onto the parking lot. He then dragged her across the parking lot into the rear floorboard of the vehicle that had hit her vehicle.

The driver of the vehicle, who was later identified as defendant, told her to shut up or he would shoot her, and asked her where her money was. She looked up and saw he had her purse which she had placed in the backseat of her vehicle before she left work. Defendant and Easterling looked through her wallet which contained an ATM card and \$9.00. Defendant said he wanted to take the victim to the bank in order to get money from an ATM machine. The victim told them she did not have any money in the bank and that she had surpassed her limit on her credit cards. Because she feared for her life, she offered them her paycheck which was in her pocket. Easterling took her paycheck and he and defendant decided to take her to cash it.

While defendant drove the vehicle, Easterling rode in the backseat with the victim. During this time, defendant reached over the backseat and hit her repeatedly, telling her to shut up or he would kill her. Easterling, who also hit and kicked her, repeatedly inserted his fingers in her vagina and fondled her breasts.

Because the victim was extremely upset, defendant and Easterling decided against cashing her paycheck. Easterling suggested taking her to Heath Park. When they arrived there, Easterling pulled the victim out of the vehicle and tied her wrists behind her back. Defendant and Easterling walked her down a hill and threw her to the ground. They tied her hands and feet with her suspenders and told her it was her own fault. They then walked a few feet away and discussed killing her and moving her vehicle. As they finished their conversation, a truck approached. They untied her feet, put her back in defendant's vehicle, and proceeded to drive to another park. When they arrived at the second park, Easterling took the victim out of the vehicle and down a hill. He threw her to the ground, tore her clothes off and put his tongue in her vagina. He then had forcible sexual inter-

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course with her. At the same time, defendant was kneeling on top of her and trying to force her to perform oral sex on him. When Easterling finished, he held her down while defendant placed his tongue and then his penis in her vagina.

When defendant finished, they again shoved the victim into the floorboard of the rear passenger seat of defendant's vehicle and started to drive, arguing about what to do with her. Defendant began driving fast and said he was going to kill all of them. The vehicle ran into something, and Easterling told defendant to stop. Easterling pulled the victim out of the vehicle and took her to his house, where he repeatedly raped and beat her. Defendant went to Easterling's house twice, the second time at approximately 11:00 a.m. While the victim pretended to sleep, defendant and Easterling discussed what they were going to do with her. Later, the three of them watched the news, which aired a story about the victim's disappearance. The two men eventually agreed to release the victim if she agreed to tell authorities she had not seen her assailants. Easterling gave her baggy clothes and sunglasses to disguise her as they left the house, and he also gave her a quarter to make a phone call. The three of them got into defendant's vehicle and drove to the Economy Inn Motel. Defendant and Easterling released the victim in the back parking lot of the motel at approximately 2:30 p.m.

The State's evidence also tended to show that, on the night of 14 April 1993, Ms. Deborah McDonald was employed at New York Pizza, a bar in Greensboro. As she was closing the bar at approximately 2:35 a.m. on 15 April 1993, she attempted to lock the back door but someone pulled it open. She told the person he needed to go and he repeatedly said, "[s]ee you later." He then said, "[y]ou know you won't say '[s]ee you later,' because I'll go all up in you and make you come." McDonald walked away from the door and told her coworker to get the person away from the door. Her coworker locked the door and they thereafter left the building. As McDonald drove home, she stopped for a red light at the intersection of Chapman and Spring Garden Streets. She saw two vehicles on Chapman Street that were positioned to turn onto Spring Garden Street but were stopped at the green light. She saw the same man who had spoken to her while she was closing New York Pizza standing at the driver's side of the front vehicle. As McDonald drove off, she saw the two vehicles pull into a parking lot. McDonald later identified the person she had seen at New York Pizza and at the intersection as defendant.

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Defendant was charged with armed robbery, two counts of first degree rape, three counts of first degree sexual offense and three counts of first degree kidnapping. The first count of kidnapping charged defendant with confining the victim in his vehicle at the intersection of Spring Garden and Chapman Streets for the purpose of facilitating the commission of robbery and not releasing her in a safe place. The second count of kidnapping charged defendant with removing the victim from the intersection to a park for the purpose of facilitating the commission of rape or sexual offenses and sexually assaulting the victim and not releasing her in a safe place. The third count of kidnapping charged defendant with removing the victim from the park to Easterling's residence for the purpose of facilitating the commission of rape or sexual offenses and sexually assaulting the victim and not releasing her in a safe place.

On 16 June 1994, defendant was convicted by a jury of robbery, two counts of first degree rape, two counts of first degree sexual offense, and three counts of first degree kidnapping. The trial court arrested judgment on Counts I and III of the first degree kidnapping charges. Defendant was sentenced to four consecutive terms of life imprisonment for the two counts of first degree rape and two counts of first degree sexual offense. He was also sentenced to forty years' imprisonment for the first degree kidnapping and ten years' imprisonment for common law robbery.

On appeal, defendant first contends the trial court erred by denying his motion to submit only a single count of kidnapping to the jury. Defendant argues that the kidnapping was a single, continuing offense, and that arresting judgment on counts I and III of the kidnapping charges was insufficient to cure the prejudice arising from the submission of three counts of kidnapping.

[1] We first note that defendant's appeal was not perfected within the times prescribed by our Rules of Appellate Procedure. The record contains an order entered by the trial court on 12 September 1996 allowing defendant to appeal as of right from the judgments and sentences imposed on 16 June 1994. According to N.C.R. App. P. 27(c), "[c]ourts may not extend the time for taking an appeal" The trial court thus exceeded its authority in entering such an order. However, we choose to suspend the Rules pursuant to N.C.R. App. P. 21(a)(1) and treat the appeal as before us on a writ of certiorari. See *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) (holding that this Court could review the merits of an appeal by certiorari even if the party failed to file notice of appeal in a timely manner).

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We now turn to the propriety of the trial court submitting three separate counts of kidnapping to the jury, rather than one, an issue of first impression in this jurisdiction. N.C. Gen. Stat. § 14-39 (1993) states in pertinent part:

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

* * * *

- (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
- (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

* * * *

(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

N.C. Gen. Stat. § 14-39 contains no express language delineating each act of confinement, restraint or removal during a kidnapping as a separate unit of prosecution. Our Supreme Court has held that, if the General Assembly fails to establish with clarity the precise unit of prosecution for a particular crime, the statute defining such crime must be strictly construed against the State. *State v. Smith*, 323 N.C. 439, 444, 373 S.E.2d 435, 438 (1988).

[2] If we interpret N.C. Gen. Stat. § 14-39 to mean that each place of confinement or each act of asportation occurring during a kidnapping constitutes a separate unit of prosecution, the State would then be authorized to divide a single act of confinement into as many counts of kidnapping as the prosecutor could devise. For example, in the instant case, the State could have charged defendant with several additional counts of kidnapping, including one for restraining the victim in her vehicle, one for moving her from her vehicle to defendant's

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vehicle, one for transporting her to the first park, and so on. Surely this is not what the General Assembly intended. Common sense dictates that the offense of kidnapping should encompass the entire period of a victim's confinement from the time of the initial act of restraint or confinement until the victim's free will is regained.

We therefore hold that the offense of kidnapping under N.C. Gen. Stat. § 14-39 is a single continuing offense, lasting from the time of the initial unlawful confinement, restraint or removal until the victim regains his or her free will. This interpretation accords with the law of other jurisdictions and what we construe to be the intent of our legislature. See *State v. Jefferies*, 403 S.E.2d 169, 172 (S.C. Ct. App. 1991), *vacated on other grounds*, 503 U.S. 931, 117 L. Ed. 2d 611 (1992) ("kidnapping is a continuing offense as long as the kidnapped person is deprived of his freedom"); *People v. La Marca*, 144 N.E.2d 420, 424-25, *modified on other grounds*, 145 N.E.2d 892 (N.Y. 1957), *cert. denied*, 355 U.S. 920, 2 L. Ed. 2d 279 (1958) ("[k]idnapping, which involves the detention of another, is, by its nature, a continuing crime"); *State v. Zimmer*, 426 P.2d 267, 286 (Kan. 1967), *cert. denied*, 389 U.S. 933, 19 L. Ed. 2d 286 (1967) ("[k]idnapping, which involves the detention of another, is a continuing offense"); *Kemple v. State*, 725 S.W.2d 483, 485 (Tex. Ct. App. 1987) ("[k]idnapping is a 'continuing offense.' The abduction does not 'occur' at only one time, but rather is a continuous, ongoing event.")

[3] In the instant case, we conclude that defendant committed one act of kidnapping, which encompassed the period beginning when Easterling removed the victim from her vehicle until she was released in the motel parking lot. The trial court therefore improperly submitted three separate counts of kidnapping to the jury, even though sentence was imposed for only one.

[4] The jury found with respect to Count II, which charged defendant with removing the victim from the intersection to a city park for the purpose of facilitating rape or sexual offenses, that the victim was not released in a safe place and that she was sexually assaulted in the course of the kidnapping. While either of these findings would be sufficient to support a conviction of first degree kidnapping under N.C. Gen. Stat. § 14-39(b), it is well-settled that a defendant cannot be separately punished for the offenses of first degree kidnapping and the underlying sexual assault on which the first degree kidnapping charge is based, as such punishment violates the double jeopardy clauses found in U.S. Const. amend. V and N.C. Const. art. I, § 19. *State v. Freeland*, 316 N.C. 13, 21, 340 S.E.2d 35, 39 (1986). Thus, in

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the trial court, defendant's sentence for first degree kidnapping rested on the validity of the jury's additional finding that the victim was not released in a safe place.

[5] To support his contention that arresting judgment on Counts I and III did not cure the harm resulting from the submission of the three counts to the jury, defendant argues that, by submitting the three counts, the trial court allowed the State to create the element of failure to release the victim in a safe place for each count, causing the jury to focus on arbitrary points during the victim's confinement, rather than her ultimate release at the motel. Defendant also argues that despite the fact the jury found the victim was not released in a safe place with respect to Count III, which charged defendant with removing the victim from a city park to Easterling's house, the evidence presented was insufficient to establish that defendant did not release the victim in a safe place at the end of her confinement.

As mentioned above, the offense of kidnapping committed by defendant was a single, continuous offense which occurred from the time the victim was removed from her vehicle until she was released in the motel parking lot. Thus, for the purpose of determining whether or not the victim was released in a safe place, the jury should have focused on her ultimate release in the motel parking lot, and not any prior time.

In deciding whether sufficient evidence was presented from which the jury could reasonably infer that the victim was not released in a safe place, we consider the evidence in the light most favorable to the State, giving the State every reasonable inference to be drawn therefrom. *State v. Jerrett*, 309 N.C. 239, 263, 307 S.E.2d 339, 352 (1983). In support of its argument that the victim was not released in a safe place, the State cites *State v. Heatwole*, 333 N.C. 156, 423 S.E.2d 735 (1992), where our Supreme Court found that a victim who had been released to the police had not been released in a safe place. In that case, defendant removed the victim from her house to his parents' house, shooting several people in the process. *Id.* at 159, 423 S.E.2d at 736-37. When ten law enforcement officers surrounded the front door with guns drawn, defendant released the victim by sending her out of the house. *Id.* at 159, 423 S.E.2d at 737. Defendant then exited the house, laid down, and was arrested. *Id.* Our Supreme Court held that "releasing a kidnap victim when the kidnapper is aware he is cornered and outnumbered by law enforcement officials is not 'voluntary' and that sending [the victim] out into the focal point of their weapons is not a 'safe place.'" *Id.* at 161, 423 S.E.2d at 738.

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The facts in *Heatwole* are easily distinguished from those of the instant case. Here, the evidence establishes that the victim was taken to a motel near a major shopping center in the middle of the afternoon, and was given change to make a phone call after her release. She was voluntarily dropped off in the motel parking lot, and was able to go directly to the motel office and seek assistance. She received assistance from employees working in the office and remained there until her roommate and apartment manager picked her up. The State has not shown that defendant and Easterling released the victim under coercion or threat from law enforcement, or that the victim was released under dangerous conditions similar to those found in *Heatwole*. Thus, all the evidence established that the victim was released in a safe place.

Since all the evidence presented showed the victim was released in a safe place, the sole basis on which defendant's conviction of first degree kidnapping could rest is that of a sexual assault during the kidnapping. *See* N.C. Gen. Stat. § 14-39(b). Though defendant is not entitled to a new trial on the kidnapping charge because the victim was sexually assaulted during the kidnapping, he cannot be separately convicted and sentenced for both first degree kidnapping and the underlying sexual assault without violating U.S. Const. amend. V and N.C. Const. art. I, § 19. It is therefore necessary to vacate the judgments and sentences for the two counts of first degree rape, two counts of first degree sexual offense and first degree kidnapping and remand this case to the trial court for resentencing. *See Freeland*, 316 N.C. at 23-24, 340 S.E.2d at 41. The trial court may arrest judgment on defendant's remaining first degree kidnapping conviction and resentence for second degree kidnapping and the four sexual assaults, or it may arrest judgment on one of the sexual assault convictions and resentence for first degree kidnapping and the remaining three sexual assaults. *See id.* at 24, 340 S.E.2d at 41. This would remove any and all prejudice defendant suffered by virtue of the improper submission of three counts of kidnapping.

[6] In his second assignment of error, defendant contends the trial court erred by denying his motion to dismiss the charge of first degree sexual offense by aiding and abetting Easterling in the sexual assault consisting of Easterling's penetration of the victim's vagina with his fingers. When ruling on a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. *State v. McCoy*, 122 N.C. App. 482, 485, 470 S.E.2d 542, 544,

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disc. review denied, 343 N.C. 755, 473 S.E.2d 622 (1996). If substantial evidence of the essential elements of the crime charged and of defendant being the perpetrator exists, the trial court must deny the motion. *Id.*

Defendant argues the State failed to present substantial evidence that he knowingly aided Easterling in the first degree sexual offense that occurred in his car. In order to prove a defendant has aided and abetted another, the State must show: "(1) that the crime was committed by another; (2) that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person; and (3) that the defendant's actions or statements caused or contributed to the commission of the crime by the other person." *State v. Bond*, 345 N.C. 1, 24, 478 S.E.2d 163, 175 (1996), *reh'g denied*, 345 N.C. 355, 479 S.E.2d 210, *cert. denied*, — U.S. —, 138 L. Ed. 2d 1022 (1997) (citing *State v. Francis*, 341 N.C. 156, 161, 459 S.E.2d 269, 272 (1995)). "That a person intends to aid the perpetrator may be inferred from his actions and from his relation to the actual perpetrator." *State v. Penland*, 343 N.C. 634, 650, 472 S.E.2d 734, 743 (1996), *cert. denied*, — U.S. —, 136 L. Ed. 2d 725, *reh'g denied*, — U.S. —, 137 L. Ed. 2d 366 (1997).

Here, the evidence established that just a few minutes before defendant's vehicle collided with the victim's vehicle, defendant appeared at the back door of New York Pizza and made lewd comments to one of its employees. After Easterling forced the victim into defendant's vehicle, defendant repeatedly reached over the seat while he was driving and hit her in the head. Both defendants drove the victim from place to place, discussed killing her, and eventually raped her. After Easterling took the victim to his house, defendant visited Easterling's house twice, and both men subsequently removed the victim from the house and released her in the motel parking lot. The evidence presented leads to the inescapable conclusion that defendant and Easterling acted together during the victim's confinement. Because the State presented substantial evidence to support the charge of first degree sexual offense by aiding and abetting Easterling in the sexual assault that occurred in defendant's vehicle, the trial court properly denied defendant's motion to dismiss.

We have carefully reviewed defendant's remaining assignment of error and find it to be without merit.

In No. 93 CrS 20505, common law robbery, no error.

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[127 N.C. App. 575 (1997)]

The sentences in No. 93 CrS 33228, Count II of first degree kidnapping; No. 93 CrS 20506, Counts III and V of first degree sexual offense; and No. 93 CrS 20506, Counts I and II of first degree rape are vacated and remanded for resentencing.

Judge WYNN concurs.

Judge WALKER concurs in a separate opinion.

Judge WALKER concurring.

The question of whether the victim was “not released in a safe place” is ordinarily an issue of fact for the jury. In this case, however, I agree with defendant’s contention that by submitting three counts of kidnapping, “the State creat[ed] the element of failure to release in a safe place for each count, causing the jury to focus on arbitrary points during the victim’s confinement, rather than her ultimate release at the motel.” This was especially true, as Count III of the kidnapping indictment charged, “he [defendant] did remove her [the victim] from a city park in the northeast section of Greensboro, N.C. to a home located at 2005 Lutheran Street . . .,” but did not mention that the victim was ultimately released in the parking lot of a motel. As such, I conclude there was insufficient evidence for a jury to find the victim was not released in a safe place; therefore, the defendant should not have been sentenced for a crime greater than second degree kidnapping.

STATE OF NORTH CAROLINA v. TERRY ANTHONY RUFF

No. COA96-1510

(Filed 4 November 1997)

1. Criminal Law § 1095 (NCI4th Rev.)— kidnapping and rape—aggravating factor—premeditation and deliberation—random victim

The trial court did not err when sentencing defendant for second-degree kidnapping and first-degree rape by finding as an aggravating factor that defendant kidnapped and raped the victim after a period of premeditation and deliberation where there was enough evidence for the trial court to find that defendant committed those offenses in a cool and calculated manner. A reason-

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able inference could be drawn from defendant's actions and words that he had previously contemplated kidnapping and raping someone, even in the absence of prior contact or ill will between defendant and the victim.

2. Criminal Law § 1097 (NCI4th Rev.)— kidnapping and rape—mitigating factor—good character and reputation

The trial court did not err when sentencing defendant for second-degree kidnapping and first-degree rape by not finding as a mitigating factor that defendant was a person of good character and reputation in his community where defendant had a prior conviction (assault with a deadly weapon); all but three of his ten character witnesses were either relatives or close friends; many of the witnesses who testified to his good character lived in different towns from defendant, making their knowledge of his general character and reputation suspect; and these witnesses testified to defendant's lack of bad character and his good work habits more than to his good character and reputation in the community. The evidence brought forth by defendant cannot be said to so clearly establish defendant's good character and reputation that no reasonable inferences to the contrary can be drawn.

3. Criminal Law § 1097 (NCI4th Rev.)— kidnapping and rape—mitigating factor—mental defect

The trial court did not err when sentencing defendant for second-degree kidnapping and first-degree rape by not finding the mitigating factor that brain surgery and the need to take seizure-preventing medication were mental conditions which mitigated his culpability. Defendant failed to carry his burden of showing by a preponderance of the evidence the existence of the mental defect and its effects upon his conduct in that the only evidence came from defendant, his wife, and the sister of her ex-husband; there was no medical or expert testimony; and there was no evidence that either the surgery or the medication had a significant effect (or any effect) on his actions at the time of the crime. N.C.G.S. § 15A-1340.16(e)(3).

4. Criminal Law § 1096 (NCI4th Rev.)— kidnapping and rape—Structured Sentencing—firearms enhancement—element of joined offense

The trial court erred when sentencing defendant for second-degree kidnapping by adding a 60-month firearms enhancement

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where defendant was convicted of first-degree rape based upon his use of a dangerous weapon, convicted of first-degree kidnapping based upon the commission of a sexual assault, and the trial court arrested judgment on the first-degree kidnapping, sentenced defendant for second-degree kidnapping, and increased that sentence under the firearms enhancement statute. Under *State v. Westmoreland*, 314 N.C. 442 (1985), a trial court cannot aggravate a sentence with acts which form the gravamen of contemporaneous convictions of joined offenses. The State relied only upon evidence showing that the forcible rape occurred with the aid of a dangerous weapon to establish first-degree rape; use of a firearm, therefore, was a "gravamen" of defendant's first-degree rape conviction. N.C.G.S. § 15A-1340.16A.

Appeal by defendant from judgment entered 20 February 1996 by Judge Donald R. Huffman in Cleveland County Superior Court. Heard in the Court of Appeals 16 September 1997.

Michael F. Easley, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State.

Brenda S. McLain, for defendant-appellant.

WYNN, Judge.

In this appeal, the defendant contests only the sentencing phase of his trial. He contends that trial court erred in: (1) finding as an aggravating factor that the offenses he committed were done with premeditation and deliberation; (2) failing to find as a mitigating factor that he was a person of good character and reputation in his community; (3) failing to find as a mitigating factor that he was suffering from a mental condition that significantly reduced his culpability for the offenses committed; and (4) applying North Carolina's Firearm Enhancement Statute to aggravate his second-degree kidnapping conviction. We find that (1) there was substantial evidence that the offense was committed with premeditation and deliberation; (2) defendant failed to present uncontradicted, substantial and inherently credible evidence that would warrant the finding of the mitigating factors he requested; and (3) the imposition of the firearm enhancement statute in the case is prohibited by our Supreme Court's case of *State v. Westmoreland*.¹ Accordingly, we vacate only that part of the defendant's sentence that was enhanced under the firearm enhancement statute.

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FACTS

At the 12 February 1996 criminal session of the Superior Court of Cleveland County, defendant was tried and convicted of first-degree kidnapping and first-degree rape. Judgment on defendant's first-degree kidnapping conviction was arrested and instead, defendant was sentenced for the offense of second-degree kidnapping. Defendant received the following sentences: For the Class E felony of second-degree kidnapping—a minimum sentence of 32 months and a maximum sentence of 60 months, which was then enhanced under the firearm enhancement statute² by 60 months for the use of a firearm in the commission of the offenses; and for the Class B1 felony of first-degree rape—a consecutive minimum term of 320 months and a maximum term of 393 months. We affirm all of sentences awarded by the trial court except for the 60 months added under the firearm enhancement statute.

Although additional facts of this case are not particularly relevant to our discussion of defendant's last assignment of error, they are significant for purposes of our discussion regarding the other three assignments raised by defendant. As such, we briefly summarize below the facts presented by the state and accepted by the jury at defendant's trial. We omit the name of the female in this case because of our concern for the female's privacy and because there is no issue of her identity in this case.

At 12:30 p.m. on 13 June 1995, a female accountant and bookkeeper at Lutz Oil Company in Shelby, North Carolina, arrived at the company's Kings Mountain office after having been asked by the company's president to fill in for another worker. A few minutes after she arrived at the office, the female went to the office bathroom to do some cleaning. While cleaning, she heard the side door of the office open; so, she left the bathroom and went to the front counter to attend to, what she believed, was a customer. The customer, later identified as defendant, asked her for some cigarettes. She reached for the cigarettes and when she turned around, defendant was pointing a gun at her face. Defendant then told her to be quiet, that he wanted her to cooperate with him, and that if she tried to run or scream he would kill her.

Poking his gun in her side, defendant then escorted her out the door and into his pickup truck. At some point, they arrived at Stoney

1. 314 N.C. 442, 334 S.E.2d 223 (1985).

2. N.C. Gen. Stat. § 15A-1340.16A (1994).

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Point Road where the defendant shoved the female out of his truck and, with the gun at her back, led her to a nearby field. After walking a short distance in the field, defendant then stopped her and took off her pantyhose. Because he felt they could be seen there from the road, however, he continued to lead her further down the field. When they finally stopped again, defendant removed her shirt and told her to remove her skirt and bra. He then removed her underpants, his own clothes, and then told her to lie down. While lying down, defendant committed sexual acts against the female and raped her. Afterwards, defendant got dressed, unloaded his gun in front of her and said: "If I'd known it was this easy, I would have never brought my gun."

As they were traveling back towards the store, the female convinced defendant to let her out prior to arriving at the store. After being let out, she ran to the store and there waiting was the president of the store and a police officer. She described the assailant to the officer, and shortly thereafter defendant was apprehended.

I.

[1] Defendant first contends that he is entitled to a new sentencing hearing because there was no evidence presented at his trial to support the trial court's finding, as a nonstatutory aggravating factor, that he committed the kidnapping and rape of the female with premeditation and deliberation. Because there was no evidence of contact between he and the female prior to 13 June 1995, defendant argues that the evidence presented at trial is susceptible of only one conclusion—that the female was a "random victim" of his, thereby making it impossible for him to have kidnapped and raped after a period of premeditation and deliberation. We disagree.

In evaluating the appropriateness of certain nonstatutory aggravating factors, our courts have consistently held that a trial court may consider whether the defendant committed the subject offenses with premeditation and deliberation.³ A defendant is said to have committed an offense with "premeditation" if he formed the intent to commit the offense during some period of time, however short, before actually committing the offense.⁴ An offense is committed with "deliberation" if the acts constituting the offense are done in a "cool state of

3. See *State v. Carter*, 318 N.C. 487, 349 S.E.2d 580 (1986); *State v. Smith*, 92 N.C. App. 500, 374 S.E.2d 617 (1988), *disc. rev. denied*, 324 N.C. 340, 378 S.E.2d 805 (1989).

4. *Smith*, 92 N.C. App. at 504, 374 S.E.2d at 619-20.

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blood.”⁵ To be in such a state, however, does not necessarily mean that the defendant brooded over committing the offense, or that he reflected upon it for a week, a day or an hour, or any other appreciable length of time.⁶ Rather, a defendant is said to have deliberated over an offense if he intended to commit the offense, and did so in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose.⁷ Finally, “in determining the question of premeditation and deliberation it is proper for the [trier of fact] to take into consideration the conduct of the defendant, before and after, as well as at the time of the [crime], and all attending circumstances.”⁸

In light of the foregoing principles, we cannot agree with defendant that there was no evidence to support the trial court’s finding that defendant kidnapped and raped the female with premeditation and deliberation. Without reiterating the particular facts of this case, we simply state here that our review of those facts convinces us that there was more than sufficient evidence to support the trial court’s finding. In view of defendant’s actions before, during and after he kidnapped and raped the female, we believe there was enough evidence for the trial court to find that he committed those offenses in both a cool and calculated manner.

Moreover, even in the absence of prior contact or ill will between defendant and the female, a reasonable inference could be drawn from defendant’s actions and words that defendant had previously contemplated, for however long, kidnapping and raping someone. For instance, the fact that defendant told the female, after he already driven her to a field and raped her, that he would not have brought a gun if he had known that “it was going to be that easy” clearly evidences, in our opinion, the “cool state of blood” in which defendant was in when he drove his pick-up truck to Lutz Oil Company in the middle of the day on 13 June 1995. Contrary then to defendant’s assertion, the inescapable conclusion is that the female, although a “random victim”, was still the subject of defendant’s premeditated and deliberated acts. That the female was in a sense, “random”, does not alter the conclusion that defendant’s actions towards her were

5. *Id.* at 504, 374 S.E.2d at 620.

6. *State v. Brown*, 249 N.C. 271, 271-73, 106 S.E.2d 232, 234 (1959) (quoting *State v. Hawkins*, 214 N.C. 326, 334, 199 S.E.2d 284, 289 (1938)).

7. *Id.*

8. *Id.*; see also *State v. Misenheimer*, 304 N.C. 108, 114, 282 S.E.2d 791, 796 (1981).

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not. Accordingly, we hold that the trial court committed no error in finding, as an aggravating factor, that defendant kidnapped and raped the female after a period of premeditation and deliberation.

II.

[2] Next, defendant contends that the trial court erred in not finding as a mitigating factor that he was a person of good character and reputation in his community. Evidence of this factor, defendant argues, was uncontradicted, substantial and inherently credible, thereby warranting mitigation of his sentence. We disagree.

When evidence in support of a mitigating factor is uncontradicted, substantial and inherently credible, it is error for the trial court to simply ignore it.⁹ When a defendant argues that his evidence is sufficient to compel a finding of a mitigating factor, he bears the same burden of persuasion as a party seeking a directed verdict.¹⁰ He must demonstrate that "the evidence so clearly established the fact in issue that no reasonable inferences to the contrary can be drawn, and that the credibility of the evidence is 'manifest as a matter of law.'"¹¹

In *Freeman*, our Supreme Court applied the foregoing principles to uphold a trial court's refusal to find, as a mitigating factor, that the defendant was a person of good character or reputation in his community.¹² The defendant in that case, who had been convicted of burglary and assault with a deadly weapon, brought forth several witnesses during his sentencing hearing to show his good character and reputation. Each witness testified to the fact that the defendant was not a violent person, that he was well liked and that he did not get into trouble. Despite the testimony of these witnesses, our Supreme Court held that the defendant's evidence, when considered in light of his prior conviction record, "[did] not rise to the level of being uncontradicted, substantial and manifestly credible."¹³ According to the court, such a finding could not be made because defendant's witnesses were "either relatives, close friends or persons who had little knowledge of defendant's general character and reputation in the community."¹⁴

9. *State v. Freeman*, 313 N.C. 539, 551, 330 S.E.2d 465, 474-75 (1985) (citing *State v. Jones*, 309 N.C. 214, 218-19, 306 S.E.2d 451, 454 (1983)).

10. *Jones*, 309 N.C. at 219, 306 S.E.2d at 455.

11. *Id.* at 219-20, 306 S.E.2d at 455 (quoting *North Carolina National Bank v. Burnette*, 297 N.C. 524, 256 S.E.2d 388 (1979)).

12. 313 N.C. at 551-52, 330 S.E.2d at 474-75.

13. *Id.*

14. *Id.*

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The evidence before us in the instant case is similar to that which was before the court in *Freeman*. Here, defendant, like the defendant in *Freeman*, had a prior conviction on his record—in this case, assault with a deadly weapon—and all but three of the ten character witnesses put on by defendant were either his relatives or close friends. In addition, many of the witnesses who testified as to defendant's "good character" lived in different towns from defendant, making their knowledge of defendant's general character and reputation in the community somewhat suspect. Furthermore, our review of the testimony of defendant's character witnesses reveals that, for the most part, these witnesses testified as to defendant's lack of bad character and his good work habits more so than they did his good character and reputation in the community.

Given the nature of defendant's character evidence and the fact that defendant was previously convicted of assault with a deadly weapon, we cannot conclude here that the credibility of defendant's evidence is "manifest as a matter of law." Like the evidence presented by the defendant in *Freeman*, the evidence brought forth by defendant in the instant case cannot be said to so clearly establish defendant's good character and reputation that no reasonable inferences to the contrary can be drawn.¹⁵ As the court observed in *Freeman*, "good character, as the term is used in the Fair Sentencing Act, means something more than the mere absence of bad character."¹⁶ Undoubtedly, it also means something more than being a person who has a good worth ethic, as was testified to by many of defendant's witnesses. For this reason, we find no error in the trial court's refusal to find, as a mitigating factor, that defendant was a person of good character and reputation in his community.

III.

[3] By his third assignment of error, defendant contends that the trial court erred by failing to find that a recent brain surgery he underwent and his need to take seizure-preventing medication were mental conditions which mitigated his culpability for the kidnapping and rape the female. Again, we disagree.

N.C. Gen. Stat. § 15A-1340.16(e)(3) allows a trial court to reduce a defendant's sentence upon a showing that, at the time of the offenses committed, the "defendant was suffering from a mental or

15. *Id.*

16. *Id.* (citing *State v. Benbow*, 309 N.C. 538, 548, 308 S.E.2d 647, 653 (1983)).

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physical condition that was insufficient to constitute a defense but significantly reduced [his] culpability for the offense." However, as with all showings he must make regarding mitigating factors, the defendant has the burden of showing the existence of the mental defect and its effects upon his conduct by a preponderance of the evidence.¹⁷

In the instant case, defendant has clearly failed to meet his burden. The only evidence of defendant's mental conditions came from defendant himself, his wife and the sister of his wife's ex-husband. There was no medical or expert testimony presented concerning the existence of any of defendant's alleged mental conditions. More importantly, there was absolutely no evidence that either defendant's recent brain surgery or the medication he was taking to prevent him from having seizures had a significant effect, or any effect for that matter, on his actions at the time he kidnapped and raped the female. Accordingly, we hold that the trial court did not err in failing to find that defendant's recent brain surgery and his need to take medication were mental conditions which reduced his culpability for the offenses committed.

IV.

[4] Lastly, defendant contends that the trial court erred by adding a 60 month firearm enhancement to his second-degree kidnapping conviction. With this contention, we agree.

In *State v. Westmoreland*,¹⁸ our Supreme Court stated that a trial court, in sentencing a defendant for a crime, could not aggravate that sentence with acts of the defendant "which form[ed] the gravamen of contemporaneous convictions of joined offenses."¹⁹

In the instant case, defendant was convicted of first degree rape based upon his use of a dangerous weapon, and convicted, although not sentenced, of first-degree kidnapping based upon the commission of a sexual assault. The court, however, arrested judgment on the first-degree kidnapping conviction and instead sentenced defendant to second-degree kidnapping. It then increased defendant's kidnapping sentence by the 60 months proscribed under

17. See *State v. Jones*, *supra*.

18. *supra*.

19. *Id.* at 449, 334 S.E.2d at 227; see also *State v. Lattimore*, 310 N.C. 295, 311 S.E.2d 876 (1984).

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N.C. Gen.Stat. § 15A-1340.16A, North Carolina's firearm enhancement statute, because it found that a firearm was used in the commission of the offenses. Based upon these circumstances, defendant argues that the use of a firearm was the "gravamen" of his first-degree rape conviction and therefore, an improper factor to be used in aggravating his kidnapping conviction.

In response, the state argues that the "gravamen" of first-degree rape is the same as that of common law rape—non-consensual sexual intercourse, not the use of a firearm. Therefore, the state contends, the trial court did not use the "gravamen" of first-degree rape to aggravate defendant's kidnapping conviction; rather, it argues, it merely used *an element* of the first-degree rape offense to aggravate defendant's conviction. Where the state's argument falls short, however, is in its assumption that non-consensual sexual intercourse alone is *the gravamen* of the offense of first-degree rape. It is not.

N.C. Gen. Stat. § 14-27.2 defines first-degree rape as follows:

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

...

(2) With another person by force and against the will of the other person, *and*:

- a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
- b. Inflicts serious personal injury upon the victim or another person; or
- c. The person commits the offense aided and abetted by one or more other persons.

(emphasis added). This statute establishes that proof of non-consensual sexual intercourse is not all that is needed for a defendant to be properly convicted of first-degree rape. If the alleged rape was committed by force and against the will of the victim, then the State must also prove, beyond a reasonable doubt, that the defendant either employed or displayed a dangerous weapon, inflicted serious bodily injury on the victim, or was aided and abetted by another. Proof, therefore, of either of these three elements is *essential* to a

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conviction of first degree rape based upon forcible intercourse, otherwise, a defendant can only be convicted of rape in the second-degree.²⁰

Here, the State relied only upon evidence showing that the forcible rape occurred with the aid of a dangerous weapon to establish proof of first-degree rape. Use of a firearm, therefore, was a "gravamen" of defendant's first-degree rape conviction, and as such, under *Westmoreland*, could not then be used by the trial court to aggravate defendant's second-degree kidnapping conviction. As such, we must vacate that part of defendant's sentence which was enhanced by the firearm enhancement statute. With that part of defendant's sentence vacated, the remaining parts of defendant's sentence as set by the trial court stand as: For the Class E felony of second-degree kidnapping, a minimum sentence of 32 months and a maximum sentence of 60 months and for the Class B1 felony of first-degree rape, a consecutive minimum term of 320 months and a maximum term of 393 months.

VACATED and REMANDED for imposition of judgment in accordance with this opinion.

Judges WALKER and SMITH concur.

DARE COUNTY BOARD OF EDUCATION, ETC., PLAINTIFF V. ELPIS J. G. B. SAKARIA,
ET. AL., DEFENDANTS

No. COA97-16

(Filed 4 November 1997)

**Eminent Domain § 126 (NCI4th)— board of education—Ch.
40A condemnation—interest—meaning of "date of taking"**

Interest from the "date of taking" allowed by N.C.G.S. § 40A-53 in a Chapter 40A condemnation proceeding refers to the date the condemnor acquires the right of possession of the property, not the date the condemnation proceeding was initiated; therefore, in a condemnation proceeding instituted by a county

20. Compare N.C. Gen. Stat. § 14-27.3; see also *State v. Barnette*, 304 N.C. 447, 466, 284 S.E.2d 298, 309 (1981) (stating that the sole distinction between the crimes of first degree rape and second-degree rape is the elements of the use of a deadly weapon, serious bodily injury, and aiding and abetting).

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board of education, the landowners were properly awarded interest from the date of the corrected judgment vesting title in the board of education.

Defendants appeal from judgment filed 7 June 1996 by Judge James E. Ragan, III in Dare County Superior Court. Heard in the Court of Appeals 10 September 1997.

DeVeau & Norcross, P.A., by Ronald E. DeVeau, for plaintiff-appellee.

Vandeventer, Black, Meredith & Martin, L.L.P., by Norman W. Shearin, Jr. and Robert L. O'Donnell, for defendants-appellants.

JOHN, Judge.

Defendants appeal the trial court's order awarding interest under N.C.G.S. § 40A-53 (1984) in this condemnation proceeding from the date of entry of the court's corrected judgment. Defendants contend interest should have been calculated effective the date of filing by plaintiff of its condemnation complaints and the contemporaneous deposit pursuant to N.C.G.S. § 40A-41 (1984) of the "sum of money estimated . . . to be just compensation." G.S. § 40A-41. We disagree and affirm the trial court.

Pertinent facts and procedural information include the following: Plaintiff Dare County Board of Education initiated condemnation proceedings in Dare County Superior Court against defendants Elpis Sakaria, Raj Alexander Trust, Jera Associates and Jack and Lillian Hillman for the purpose of acquiring six lots adjacent to Cape Hatteras School in Buxton on Hatteras Island. The land was intended for expansion of school recreation fields under Article 3 of Chapter 40A. Condemnation complaints were filed 19 February 1993, and plaintiff deposited \$21,400 with the clerk of court pursuant to G.S. § 40A-41 on that date. Defendants answered and challenged, under N.C.G.S. § 115C-517 (1994) and the North Carolina Constitution, plaintiff's authority to take defendants' land.

The cases were consolidated for trial of all issues other than just compensation, and the trial court resolved those issues in favor of plaintiff. A corrected judgment was entered 25 May 1994 providing, *inter alia*:

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That title to the properties described in the Complaint is vested in [plaintiff], and [plaintiff] is entitled to possession and ownership thereof.

This Court affirmed the trial court's decision in *Dare County Bd. of Education v. Sakaria*, 118 N.C. App. 609, 456 S.E.2d 842 (1995), and our Supreme Court affirmed this Court's decision *per curiam*, 342 N.C. 648, 466 S.E.2d 717 (1996), *reh'g denied*, 343 N.C. 128, 468 S.E.2d 778 (1996). Defendants' subsequent appeal to the United States Supreme Court was unavailing. *Sakaria v. Dare County Board of Ed.*, *cert. denied*, 65 U.S.L.W. 3335, 3341, 136 L. Ed. 2d 325 (1996); *rehearing denied*, 65 U.S.L.W. 3466, 136 L. Ed. 2d 638 (1997).

The just compensation portion of the proceedings commenced in the trial court 15 April 1996. The jury returned verdicts totaling \$475,000 in favor of defendants 19 April 1996. Defendants did not seek disbursement of the just compensation estimate deposit prior to the conclusion of trial. The trial court's judgment on the verdict awarded interest pursuant to G.S. § 40A-53 from 25 May 1994, the date of the corrected judgment on the issue of plaintiff's right to take. Defendants timely filed notice of appeal, contending interest should have been calculated from 19 February 1993, the date of filing of the four condemnation complaints and of plaintiff's deposit. Although plaintiff likewise entered notice of cross-appeal, it filed no brief in support of its assignments of error, and we deem its cross-appeal abandoned. N.C.R. App. P. 13(c).

The sole issue for our resolution is the meaning of the phrase "date of taking" in G.S. § 40A-53. The statute reads as follows:

To the amount awarded as compensation by the commissioners or a jury or judge, the judge shall add interest at a rate of six percent (6%) per annum on said amount from the date of taking to the date of judgment. Interest shall not be allowed from the date of deposit on so much thereof as shall have been paid into court as provided in this Article.

Defendants contend "date of taking" refers to the date upon which a condemnation complaint has been filed. Plaintiff, on the other hand, interprets "date of taking" to mean "the date that title vests in the Board or the date that the Board obtains the right of possession, whichever is earlier." We conclude plaintiff is correct.

At the outset, we note Chapter 40A does not define "date of taking" either in G.S. § 40A-53 or within the definitions set out in

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N.C.G.S. § 40A-2 (1984). We further observe that no appellate decision has been rendered by our courts addressing G.S. § 40A-53 since it became effective fifteen years ago. The issue presented thus is one of first impression.

Statutory interpretation presents a question of law. *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 288, 444 S.E.2d 487, 490, *disc. review denied*, 337 N.C. 694, 448 S.E.2d 528 (1994). The cardinal principle in the process is to ensure accomplishment of legislative intent. *Id.* To achieve this end, the court should consider “the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.” *Hayes v. Fowler*, 123 N.C. App. 400, 404-05, 473 S.E.2d 442, 445 (1996) (citation omitted).

Further, it is presumed the legislature acted with full knowledge of prior and existing law, *Investors, Inc. v. Berry*, 293 N.C. 688, 695, 239 S.E.2d 566, 570 (1977), and with care and deliberation, *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970). Every statute is to be interpreted “in light of the . . . laws as they were understood” at the time of the enactment at issue. *News and Observer v. State; Co. of Wake v. State; Murphy v. State*, 312 N.C. 276, 282, 322 S.E.2d 133, 137 (1984).

Finally, when a term has obtained long-standing legal significance, we presume the legislature intended such significance to attach to its use of that term, absent indication to the contrary. *Black v. Littlejohn*, 312 N.C. 626, 639, 325 S.E.2d 469, 478 (1985). A complementary rule of construction provides that when technical terms or terms of art are used in a statute, they are presumed to be used with their technical meaning in mind, likewise absent legislative intent to the contrary. *Id.*

Chapter 40A, the section at issue herein, was enacted in 1981, repealing and replacing Chapter 40. The latter contained no interest provision analogous to G.S. § 40A-53. However, pre-Chapter 40A case law uniformly held interest ran from the date of taking, interpreted as the date upon which the condemnor acquired the right to possession of the property. *See, e.g., Light Co. v. Briggs*, 268 N.C. 158, 159, 150 S.E.2d 16, 17 (1966) (respondents entitled to interest from date petitioner “acquired the right to possession,” viewed as date petitioner paid to clerk of court “the amount of damages assessed by commissioners” and not “the date petitioner instituted this proceeding”); *Power Co. v. Winebarger*, 42 N.C. App. 330, 336, 256 S.E.2d 723, 727-28 (1979), *reversed on other grounds*, 300 N.C. 57, 265 S.E.2d 227

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(1980) (“[i]t is true that a party is entitled to 6 per cent interest from the date of the taking The date the condemnor acquires the right to possession determines the date from which interest should be paid,” and condemnor “was not entitled to possession until the entry of judgment” vesting title in condemnor) (citations omitted); and *Board of Education v. Evans*, 21 N.C. App. 493, 497, 204 S.E.2d 899, 902, *cert. denied*, 285 N.C. 588, 206 S.E.2d 862 (1974) (“[i]t is well established as the law in this State that the landowner is entitled to interest from the date the condemnor acquires the right to possession, not from the date the petition is filed”).

Conversely, the law was similarly settled that, for purposes of determining the value of the property, the critical date was the “date of taking,” *see, e.g., Charlotte v. Spratt*, 263 N.C. 656, 662, 140 S.E.2d 341, 345 (1965); *City of Kings Mountain v. Goforth*, 283 N.C. 316, 322, 196 S.E.2d 231, 236 (1973), consistently interpreted as the date of commencement of condemnation proceedings. *Id.*

Accordingly, the law at the time the General Assembly enacted Chapter 40A viewed “date of taking” in two ways depending upon the context. Regarding valuation of condemned property, the “date of taking” referred to that date upon which condemnation proceedings were begun. With respect to interest, “date of taking” referred to the date upon which the condemnor obtained the right to possession of the property.

Defendants in essence urge us to adopt a definition of “date of taking” that encompasses the premise that their “use, enjoyment and benefit of ownership of their land was irreparably changed as of February 19, 1993,” the date condemnation proceedings were initiated. At such point, according to defendants, any rights they had to the land, such as removal of timber, buildings, structure or fixtures on the property, as noticed to them by plaintiff pursuant to G.S. § 40A-41, were “illusory.” Moreover, defendants continue, any “opportunity to use, enjoy or benefit from owning their lots was irreparably lost by the initiation of the condemnation proceedings.”

While sensitive to the practical implications of defendants’ argument, we conclude such concerns must be directed to the General Assembly. The case law set out above demonstrates that the term “date of taking” had acquired legal significance as a term of art for purposes of computation of interest at the time Chapter 40A was enacted, and we ascertain no legislative intent to deviate from this accepted common law meaning. *See Black*, 312 N.C. at 639, 325

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S.E.2d at 478. Had the General Assembly intended “date of taking” in the context at issue to denote the date of filing of the condemnation complaint, it was within their power, and not ours, to so provide. Significantly, the General Assembly undertook to codify “date of taking” regarding valuation in N.C.G.S. § 40A-63 (1984), clearly stating “[t]he day of filing of a petition or complaint shall be the date of valuation. . . .” However, no such action was taken concerning the calculation of interest, and we decline to infer therefrom any intent to deviate from the settled common law meaning of “date of taking.”

Both parties cite *Airport Authority v. Irvin*, 306 N.C. 263, 293 S.E.2d 149 (1982), although its applicability is somewhat limited in that the condemnor therein was a private entity and the case was decided under Chapter 40. The “sole question” before the Court in *Airport Authority* was the proper date for determining the value of the property for just compensation, *id.* at 264, 293 S.E.2d at 151, which our Supreme Court held to be the date of filing of the condemnation petition. *Id.* Although the new statute did not apply, the Court noted with interest the codification of this common law rule by G.S. § 40A-63. *Id.* at 271, 293 S.E.2d at 154-55.

The Court then considered the question of interest on the jury award and held “the date the condemnor acquires the right to possession is the date from which interest should be paid.” *Id.* at 272, 293 S.E.2d at 155. The Court stated the condemnor

acquired the right of possession at the same time title vested—upon entry of judgment by the trial court awarding damages for the taking and the payment of that amount by the [condemnor].

Id. at 273, 293 S.E.2d at 156. However, the condemnor in *Airport Authority* had elected not to pay the award into court as permitted by Chapter 40 and thus deprived itself of the right to actual possession. *Id.* The Court therefore concluded the property owners were entitled to interest from the date of filing of the commissioner’s report determining the value of the property. *Id.* at 274, 293 S.E.2d at 156. We do not believe this case changes the meaning of “date of taking” for the purpose of accrual of interest; indeed, the decision tends to support plaintiff’s position herein.

Based upon the foregoing, we hold that “date of taking” in G.S. § 40A-53 connotes the date upon which the condemnor acquires the right to possession of the property involved. Defendants have failed to persuade us that, upon enactment of Chapter 40A, the General

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Assembly intended any deviation from the settled common law meaning of "date of taking" in the context of computation of interest.

Additionally, in ascertaining and giving effect to legislative intent, courts are to construe a legislative act as a whole. *In re Badzinski*, 79 N.C. App. 250, 255, 339 S.E.2d 80, 82-83, *disc. review denied*, 317 N.C. 703, 347 S.E.2d 35 (1986). Bearing this rule in mind, we note that N.C.G.S. § 40A-42 (Cum. Supp. 1996) states with precision that title and the right to immediate possession vest in certain specified circumstances, none of which are present in the case *sub judice*.

Subsection (a) of G.S. 40A-42, for example, which provides for vesting of title and the right of possession "upon the filing of the complaint and the making of the deposit in accordance with G.S. 40A-41," is not applicable to plaintiff School Board. Subsection (a), which sets out sixteen particular instances in which the filing of complaint and making of deposit date applies, does not include educational condemnation in its listing. The subsection thus does not apply here where plaintiff instituted the instant condemnation proceedings for purposes of acquiring land to expand recreational fields at Cape Hatteras School.

Subsection (b) of G.S. § 40A-42 designates three events which trigger vesting of title and the right to immediate possession upon filing of a condemnation complaint and the deposit of estimated just compensation: (1) filing of an answer by the landowner requesting only determination of just compensation, (2) failure of the landowner to file a timely answer, and (3) disbursement of the deposit in accordance with the provisions of G.S. § 40A-44. None of these events occurred in the present instance. Defendants challenged the authority of plaintiff to condemn the property, answered the complaint within the 120-day time period established by G.S. § 40A-46, and obtained plaintiff's deposit only subsequent to trial.

In sum, under the circumstances *sub judice*, the trial court did not err in awarding interest calculated from the date upon which plaintiff was entitled to possession, *i.e.*, the date of the corrected judgment.

Affirmed.

Judges LEWIS and SMITH concur.

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[127 N.C. App. 592 (1997)]

STATE OF NORTH CAROLINA v. TERRENCE LEROY WRIGHT

No. COA97-49

(Filed 4 November 1997)

1. Evidence and Witnesses § 116 (NCI4th)— burglary and murder—guilt of another—evidence excluded

The trial court did not err in a prosecution for first-degree murder and burglary in which defendant was convicted of first-degree burglary by excluding evidence that the victim's secretary was upset that he was dating another woman after an affair of 17 to 19 years and that the secretary had committed the murder. The proposed testimony from five witnesses did no more than create mere conjecture that the secretary may have had a motive; there was no evidence linking her to a murder weapon or to the crime and the evidence was not inconsistent with defendant's guilt.

2. Burglary and Unlawful Breakings § 75 (NCI4th)— burglary—felonious intent—evidence sufficient

The trial court properly denied defendant's motion to dismiss a charge of first-degree burglary for insufficient evidence of felonious intent where the State presented evidence that defendant entered the victim's residence during the night, emerged with a bag containing items which he did not previously possess, and blood was noticed on defendant's clothing, indicating some type of struggle inside the house. The jury could infer from these facts the requisite felonious intent.

3. Evidence and Witnesses § 339 (NCI4th)— murder and burglary—previous theft—evidence of ill will

The trial court did not err in a prosecution for first-degree murder and first-degree burglary by admitting, for the purpose of showing ill will, evidence that defendant had previously stolen from the victim. N.C.G.S. § 8C-1, Rule 404(b) is a general rule of inclusion with but one exception, and it has been held that a defendant's prior assaults on the victim are admissible for the purpose of showing malice or ill will. The trial court's ruling under N.C.G.S. § 8C-1, Rule 403 that the probative value was not outweighed by the danger of unfair prejudice was not arbitrary.

Appeal by defendant from judgment entered 11 April 1997 by Judge Claude S. Sitton in Graham County Superior Court. Heard in the Court of Appeals 7 October 1997.

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[127 N.C. App. 592 (1997)]

Attorney General Michael F. Easley, by Assistant Attorney General Jill Ledford Cheek, for the State.

Appellate Defender Malcolm Ray Hunter, Jr. for defendant-appellant.

WALKER, Judge.

On 3 June 1993, Michelle Carver ("Carver") entered the bedroom of her uncle Hoover Williams' ("Williams") residence and found him lying dead on the floor. The autopsy revealed 32 wounds on Williams' upper body, including a wound which "halfway severed his windpipe." The time of death was estimated to be sometime between 10:30 p.m. on 2 June 1993 and 4:00 a.m. on 3 June 1993.

Defendant was indicted for first-degree murder and first-degree burglary. The State's evidence tended to show that Williams was a grading contractor engaged in construction jobs all over the southeastern United States. He maintained a business office, managed by Verna Garland ("Garland"), on the ground floor of a two-story building in Robbinsville, North Carolina. Further, he occupied a separate, two-bedroom residence on the second floor. Occasionally, Williams would allow his employees, particularly defendant, to live in the second bedroom while working on a local job. According to defendant, he had met Williams in May 1988 in South Carolina, where Williams offered defendant a job and persuaded defendant to move to Robbinsville.

One of the State's witnesses was Carl Wright ("Wright"), a friend of defendant. According to Wright, defendant called him in May 1993 and asked him to drive defendant from Athens, Georgia to Robbinsville, North Carolina to see Williams. Wright agreed, and after they arrived at Williams' residence around 10:15 p.m. on 2 June 1993, Wright stayed in the car while defendant went inside. Soon thereafter, Wright heard a noise from inside the residence and then saw defendant emerge with a key, which he used to enter Williams' downstairs office. A short time later, defendant came out of the office wearing a blood-stained shirt and holding a white bag which contained jewelry, a stamp holder, change, blank checks and a notebook with the names and addresses of people with whom Williams had done business. Wright and defendant then headed back to Georgia, and along the way, defendant threw his shirt and some other items out of the car window. When Wright asked defendant about what had happened at Williams' residence, defendant acted nervous and agitated and told Wright the less he knew the better off he would be.

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On the way back to Georgia, Wright and defendant stopped at a restaurant in Marietta for a meal. Since defendant had thrown his shirt out of the car window, Wright loaned him a suit jacket. Defendant paid for the meal with a one-hundred dollar bill.

Defendant's former girlfriend, Ella Marie Skelton ("Skelton"), testified that when defendant unexpectedly arrived at her home in Athens the day after Williams was killed, he was shirtless and had blood on his pants leg. Further, defendant was acting "real funny, real shaky and nervous," and when he pulled a one-hundred dollar bill from his jacket pocket he told her not to tell anyone about the money. She then heard defendant claim that they would not "pin this on [him]." After Skelton began asking defendant questions, he told her that she knew "too damn much now," and that the less she knew, the better off she would be. He then threatened to kill her if she said anything about the one-hundred dollar bill or the blood on his clothes, and began to vandalize her apartment.

In August 1993, defendant telephoned Wright and asked him to pick up some money which Betty Anderson ("Anderson") was wiring to him at a local Western Union office. When Wright went to pick up the money, he was detained by law enforcement officers and later led the officers to his house where defendant was arrested.

Defendant's former cellmate, Paul Schmitz ("Schmitz"), testified that defendant had confessed to killing Williams by stabbing him to death after Williams had refused to give him more money. Defendant told Schmitz that he had stolen four or five hundred dollars from Williams in one-hundred dollar bills.

After a jury was unable to reach a unanimous verdict on either charge in the first trial on 4 December 1995, the case was moved from Graham County to Swain County. At the second trial, the jury was again unable to reach a unanimous verdict as to the first-degree murder charge, but found defendant guilty of first-degree burglary. By a judgment entered on 11 April 1996, defendant was sentenced to thirty years in prison.

[1] Defendant first assigns as error the trial court's exclusion of third-party guilt evidence which consisted of the testimony of five witnesses. At trial, defendant attempted to introduce the testimony of Jody Carver ("Carver"), Anderson, Betty Hyde ("Hyde"), Mildred Williams and Susan Hudson ("Hudson") to show that Garland, and not he, murdered Williams.

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Williams' daughter, Carver, testified on *voir dire* that she had a conversation with her father approximately three weeks before his death, during which Williams had told her that Garland was upset that he was dating Anderson, since Garland and Williams had been having an affair for approximately 17 to 19 years.

Anderson testified on *voir dire* that she had numerous conversations with Williams, during which Williams had recounted certain incidents with Garland concerning his affair with Anderson. Apparently, Garland was distraught over their affair and had scratched Williams and torn up her office in disgust. Williams also commented that he was not going to beg Garland to come back to work and he was going to find a new secretary.

Hyde testified on *voir dire* that in 1993, while she was the tax assessor in Graham County, Williams had come to her office and said, "I think there's going to be trouble, and I need to get my affairs in order." She told him to consult an attorney, and he agreed to do so.

Williams' sister, Mildred Williams, testified on *voir dire* that while she was visiting with Williams one day, Williams had said that he was upset with Garland, that he was tired of her attitude, and that he was going to fire her.

Finally, Hudson testified on *voir dire* that in May of 1993, she was a waitress at a restaurant in Robbinsville which Williams patronized, and that he came in one day "a little upset." He told her that he was sick of dealing with Garland, was depressed, and then asked Hudson if she would like to come and work for him as his secretary.

At trial, defendant argued that the foregoing testimony was relevant to show the guilt of another. The trial court concluded: (1) that the evidence was not relevant for the purpose sought; and, (2) that Williams' statements to the witnesses were excluded by the hearsay rule. On appeal, defendant contends the trial court erred in excluding the evidence on the grounds that: (1) the evidence was relevant to show that someone other than defendant, and specifically Garland, may have committed the murder; and (2) Williams' statements to the witnesses were admissible as exceptions to the hearsay rule.

It is now well-settled law that third-party guilt evidence is "governed, as it should be, by the general principle of relevancy under which the evidence will be admitted unless in the particular case it appears to have no substantial probative value." *State v. Hamlette*, 302 N.C. 490, 501, 276 S.E.2d 338, 346 (1981) (citation omitted); *see*

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also 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 118 (4th ed. 1993). However, our Supreme Court has recently held:

[W]here the evidence is proffered to show that someone other than the defendant committed the crime charged, admission of the evidence must do more than create mere conjecture of another's guilt in order to be relevant. Such evidence must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant's guilt.

State v. McNeill, 326 N.C. 712, 721, 392 S.E.2d 78, 83 (1990); see also *State v. Larrimore*, 340 N.C. 119, 144-145, 456 S.E.2d 789, 801-802 (1995) (evidence tending to show that victim's wife had motive to kill him properly excluded); see also *State v. Jones*, 337 N.C. 198, 210-211, 446 S.E.2d 32, 39-40 (1994) (evidence of circumstances of sale of victim's farm, offered to show motive of possible third party, did not point to guilt of specific person).

In the present case, the proposed testimony from the five witnesses did no more than "create mere conjecture" that Garland may have had a motive to commit the murder. There was no evidence linking Garland to a murder weapon or in any way linking Garland to the crime. Further, the evidence was not inconsistent with defendant's guilt. Therefore, the evidence was not relevant, and we find no error in the trial court's decision to exclude the evidence.

Under N.C. Gen. Stat. § 8C-1, Rule 402, "[e]vidence which is not relevant is not admissible." N.C. Gen. Stat. § 8C-1, Rule 402 (1992). Therefore, since we have found that the testimonial evidence was not relevant, it is unnecessary to address defendant's claim that the evidence was admissible as an exception to the hearsay rule.

[2] Defendant next contends that the trial court erred in denying his motion to dismiss the charge of first-degree burglary on the grounds that there was insufficient evidence to warrant such a charge.

When considering a defendant's motion to dismiss for insufficiency of the evidence, the trial court must consider "whether there is substantial evidence of each essential element of the offense charged, or of a lesser included offense of that charged." *State v. Robbins*, 309 N.C. 771, 774, 309 S.E.2d 188, 190 (1983). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988). The evidence must be considered in the

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light most favorable to the State, and the State is entitled to every reasonable inference. *State v. Robbins*, 309 N.C. at 775, 309 S.E.2d at 190. Further, if the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence. *State v. Scott*, 323 N.C. at 353, 372 S.E.2d at 575. However, if the evidence merely raises a suspicion as to whether the defendant committed the charged offense, then it is insufficient and the motion to dismiss should be allowed. *Id.*

In a prosecution for first-degree burglary, the burden is on the State to prove that the defendant committed a: (1) breaking; (2) and entering; (3) at nighttime; (4) into the dwelling house, or a room used as a sleeping apartment, of another; (5) which is actually occupied at the time; and (6) with the intent to commit a felony therein. *State v. Wells*, 290 N.C. 485, 496, 226 S.E.2d 325, 332 (1976).

In his appeal, the defendant addresses only the sixth element of the crime, arguing that the trial court erred by not granting his motion to dismiss because there was insufficient evidence to show that he possessed the requisite felonious intent at the time he entered Williams' residence.

Felonious intent is an essential element which the State must allege and prove in order to sustain a charge of first-degree burglary. *State v. Accor and State v. Moore*, 277 N.C. 65, 72-73, 175 S.E.2d 583, 588 (1970). However, since felonious intent is a state of mind and may be inferred from a defendant's "acts, conduct, and inferences fairly deducible from all the circumstances," it is within the province of the jury to determine whether the defendant had the requisite felonious intent at the time of the breaking and entering. *Id.* at 73-74, 175 S.E.2d at 589.

In this case, the State presented evidence that defendant entered Williams' residence during the night and emerged with a white bag containing certain items which defendant did not previously possess. Further, both Wright and Skelton testified that they noticed blood on defendant's clothing, which indicates that some type of struggle took place inside the house. We find that the jury could reasonably infer from these facts that defendant possessed the requisite felonious intent at the time of the breaking and entering, and we therefore overrule this assignment of error.

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[3] In his final assignment of error, defendant contends that the trial court erred by allowing the State to admit evidence that defendant had previously stolen from Williams for the purpose of showing ill will between the two parties.

N.C. Gen. Stat. § 8C-1, Rule 404(b) states, in pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C. Gen. Stat. § 8C-1, Rule 404(b) (Cum. Supp. 1996). However, it is now clear that Rule 404(b) is a “general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.” *State v. Coffey*, 326 N.C. 268, 278-279, 389 S.E.2d 48, 54 (1990) (emphasis in original). Further, our Supreme Court has held that in a murder case, a defendant’s prior assaults on the victim are admissible for the purpose of showing malice or ill will against the victim. *State v. Alston*, 341 N.C. 198, 229, 461 S.E.2d 687, 703 (1995), *cert. denied*, 134 L. Ed. 2d 100, *mandamus denied*, 472 S.E.2d 334 (N.C. 1996). In this case, the trial court could properly find that defendant’s prior robbery of Williams produced feelings of ill will between the two parties.

Even if evidence is relevant under Rule 404(b), however, the trial court may exclude such evidence under the Rule 403 balancing test. N.C. Gen. Stat. § 8C-1, Rule 403 states, in pertinent part:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

N.C. Gen. Stat. § 8C-1, Rule 403 (1992). But, “exclusion of evidence under the Rule 403 balancing test is within the sound discretion of the trial court.” *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993), *reh’g denied*, 510 U.S. 1066, 126 L. Ed. 2d 707 (1994). Further, a trial court does not commit an abuse of discretion unless its “ruling is manifestly un-

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ported by reason or is so arbitrary it could not have been the result of a reasoned decision.” *Id.* In this case, we conclude that the trial court’s ruling was not arbitrary, and we therefore overrule this assignment of error.

No error.

Judges WYNN and SMITH concur.

JESSICA SIERRA HOPE ANDERSON BY AND THROUGH GUARDIAN AD LITEM
JERRY H. JEROME, TAMMY ANDERSON AND HUSBAND, DALE ANDERSON,
PLAINTIFFS V. TOWN OF ANDREWS AND COUNTY OF CHEROKEE, DEFENDANTS

No. COA97-41

(Filed 4 November 1997)

1. Appeal and Error § 111 (NCI4th)— denial of motion to dismiss—sovereign immunity—right of appeal

The denial of defendant town’s motion to dismiss a child’s personal injury claim on the ground of sovereign immunity was immediately appealable.

2. Appeal and Error § 114 (NCI4th)— denial of motion to dismiss—failure to state claim—no right of appeal

The denial of defendant town’s Rule 12(b)(6) motion to dismiss a father’s claim for negligent infliction of emotional distress for failure to state a claim was not immediately appealable.

3. Municipal Corporations § 444 (NCI4th)— tort liability—waiver of immunity—sufficient allegation

An allegation that defendant town, at all times relevant to this claim, maintained liability insurance affording coverage to this action was sufficient to allege waiver of sovereign immunity by the purchase of liability insurance even though the word “waiver” was not used in the complaint.

4. Municipal Corporations § 445 (NCI4th)— tort liability—waiver of immunity—extent of waiver—sufficient allegation

An allegation that defendant town maintained liability insurance affording coverage to this action was sufficient to withstand

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defendant town's motion to dismiss plaintiffs' claims for damages in excess of the town's insurance policy limits since this was a sufficient allegation under a liberal construction of the pleadings that the town has liability insurance to cover the full amount of the requested damages.

Appeal by defendant Town of Andrews from order entered 2 December 1996 by Judge James U. Downs in Cherokee County Superior Court. Heard in the Court of Appeals 11 September 1997.

Roberts & Stevens, P.A., by Frank P. Graham and Christopher Z. Campbell, for defendant-appellant Town of Andrews.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Larry S. McDevitt and Katherine L. Roth, for plaintiffs-appellees.

WYNN, Judge.

In general, municipalities in North Carolina are immune from liability for their negligent acts arising out of governmental activities unless the municipality waives such immunity by purchasing liability insurance. A plaintiff seeking recovery under such theory must allege waiver of immunity by purchase of insurance. Did the complaint in this case sufficiently allege waiver by stating: "Upon information and belief, Defendants each maintain, and at all times relevant to this claim maintained, liability insurance affording coverage to this action." Because we believe that this pleading met the notice requirements under our law, we hold that it sufficiently alleged waiver of immunity by purchase of liability insurance.

The plaintiff in this case, a minor, by and through her parents sued Cherokee County and the Town of Andrews ("Town") for damages arising from injuries she sustained in a park maintained by the Town. The parents alleged that the negligence of the county and Town combined to result in Jessica's injuries.

Defendant Town of Andrews answered and moved to dismiss allegations in specific paragraphs of plaintiffs' complaint under Rule 12(b)(6) and to dismiss the action on the grounds of sovereign immunity. The trial court denied the Town's motions to dismiss and the Town appealed. In a reply brief filed in this Court, plaintiffs moved to dismiss the Town's appeal.

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I.

[1],[2] Plaintiffs motion to dismiss the Town's appeal contends that there is no right to appeal from the denial of a 12(b)(6) motion to dismiss, even where the defendant has the defense of sovereign immunity. We have previously held otherwise. In *EEE-ZZZ Lay Drain Co. v. N.C. Dept. of Human Resources*,¹ we said:

Generally, the denial of a motion to dismiss or for summary judgment is interlocutory and not immediately appealable. However, recent case law clearly establishes that if immunity is raised as a basis in the motion for summary adjudication, a substantial right is affected and the denial is immediately appealable.²

Thus, as to the issue on appeal that relates to the Town's defense of sovereign immunity, the plaintiffs' motion to dismiss this appeal is denied. However, we grant the plaintiffs' motion to dismiss the Town's appeal from the trial court's denial of its 12(b)(6) motion to dismiss the claim of plaintiff Dale Anderson, Jessica's father, for negligent infliction of emotional distress. The Town's argument is not based on sovereign immunity, but rather contends that the denial was error because the facts alleged by plaintiffs were not sufficient to state a claim for negligent infliction of emotional distress as a matter of law. Ordinarily the denial of a 12(b)(6) motion is not immediately appealable,³ and we therefore dismiss the Town's appeal as to that issue.

II.

[3] The Town first argues that the trial court erred by not dismissing Jessica's complaint for failure to state a claim because the Town's operation of the park was a governmental function and the complaint failed to allege waiver of governmental immunity by the purchase of liability insurance. In general, a municipality may not be sued for torts arising out of its involvement in governmental activities.⁴ This immunity does not apply when the municipality engages in a propri-

1. 108 N.C. App. 24, 422 S.E.2d 338 (1992), *overruled on other grounds by* Meyer v. Walls, 489 S.E.2d 880 (1997).

2. *Id.* at 27, 422 S.E.2d at 340.

3. *Mellon v. Prosser*, 486 S.E.2d 439, 441 (1997).

4. *Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 504, 451 S.E.2d 650, 657, *appeal dismissed and disc. review denied*, 339 N.C. 739, 454 S.E.2d 654 (1995).

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etary function.⁵ Furthermore, a municipality may waive its immunity from tort liability for governmental activities by purchasing liability insurance.⁶ However, if the plaintiff does not allege “waiver of immunity by the purchase of insurance,” then the plaintiff has not stated a claim against the municipality.⁷

In the subject case, paragraph 5 of the complaint alleged that “[u]pon information and belief, Defendants each maintain, and at all time relevant to this claim maintained, liability insurance affording coverage to this action.” Nonetheless, the Town contends that this allegation was insufficient to allege waiver of immunity by purchase of insurance. We disagree.

At least two decisions of this Court have found allegations by a plaintiff to be sufficient to allege waiver of immunity. In *Davis v. Messer*,⁸ the complaint “specifically alleged each [defendant] had ‘waived governmental or sovereign immunity by the procurement of liability insurance which provides coverage to each of them for the full dollar amount of the claims asserted.’ ”⁹ This Court held that this was sufficient to withstand defendant municipality’s motion to dismiss on the basis of sovereign immunity.¹⁰ In *Lynn v. Overlook Development*,¹¹ this Court found that plaintiffs’ complaint contained a sufficient allegation of waiver to withstand a 12(b)(6) motion.¹² Review of the record in that case reveals that the plaintiffs alleged “[u]pon information and belief the City of Asheville is insured for its potential liability based on this claim and has thereby waived its sovereign immunity to the extent of said insurance.”

In both *Davis* and *Lynn* the plaintiffs explicitly used the word waiver in the complaint and explicitly stated that the waiver of sovereign immunity was the result of the purchase of insurance.

5. *Gregory v. City of Kings Mountain*, 117 N.C. App. 99, 103, 450 S.E.2d 349, 353 (1994).

6. N.C. Gen. Stat. § 160A-485 (1994).

7. *Morrison-Tiffin*, 117 N.C. App. at 504, 451 S.E.2d at 657.

8. 119 N.C. App. 44, 457 S.E.2d 902, *disc. review denied*, 341 N.C. 647, 462 S.E.2d 508 (1995).

9. *Id.* at 50, 457 S.E.2d at 906.

10. *Id.* at 52-53, 457 S.E.2d at 907.

11. 98 N.C. App. 75, 389 S.E.2d 609 (1990), *rev'd on other grounds in part and aff'd in part*, 328 N.C. 689, 403 S.E.2d 469 (1991).

12. *Id.* at 79, 389 S.E.2d at 612-13.

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However, neither case held that use of the word waiver was required to allege waiver. Furthermore, under the Rules of Civil Procedure, a complaint must contain "[a] short and plain statement . . . sufficiently particular to give the court and the parties notice of [what is] intended to be proved."¹³ The Rules of Civil Procedure also provide that "[n]o technical forms of pleading or motions are required."¹⁴ We have previously held that the policy behind notice pleading is to resolve controversies on the merits, after an opportunity for discovery, instead of resolving them based on the technicalities of pleading.¹⁵ We have also held that a statement of a claim is adequate if it gives sufficient notice of the basis for the claim to allow the adverse party to understand it and prepare a responsive pleading.¹⁶

In this case, the plaintiffs' allegations were sufficient to satisfy the requirement of pleading waiver because they served to notify the Town of the grounds for their claim. From paragraph 5 of the Town's answer it is obvious that the Town actually was on notice: "It is admitted that this answering Defendant has waived its sovereign immunity to the extent that liability insurance has been acquired and may provide or afford coverage for the allegations as contained in this action." We therefore hold that because the plaintiffs sufficiently alleged waiver, the trial court did not err in denying the motion to dismiss.

III.

[4] The Town next argues that the trial court erred in denying its motion to dismiss plaintiffs' claim for those damages in excess of the Town's insurance policy limits.

N.C. Gen. Stat. § 160A-485(a) provides that a city is liable in tort only to the extent that it has insurance that will cover the tort damages.¹⁷ However, on a motion to dismiss, the court treats all of the allegations of the complaint as true¹⁸ and the allegations are liberally

13. N.C.R. Civ. P. 8(a)(1).

14. N.C.R. Civ. P. 8(e)(1).

15. *Smith v. City of Charlotte*, 79 N.C. App. 517, 528, 339 S.E.2d 844, 851 (1986).

16. *Pyco Supply Co., Inc. v. American Centennial Ins. Co.*, 321 N.C. 435, 442, 364 S.E.2d 380, 384 (1988).

17. N.C. Gen. Stat. § 160A-485(a) (1987).

18. *Lynn v. Overlook Development*, 98 N.C. App. 75, 79, 389 S.E.2d 609, 612 (1990), *rev'd on other grounds in part and aff'd in part*, 328 N.C. 689, 403 S.E.2d 469 (1991).

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construed.¹⁹ In *Davis v. Messer*,²⁰ plaintiffs' tort complaint alleged that the defendant municipality had insurance covering the full amount of the claims against it.²¹ The Court pointed out that it was required to accept that factual allegation as true, and held that its presence in the complaint was sufficient to withstand the defendant's motion to dismiss.²²

In this case, the plaintiff alleged "[u]pon information and belief, Defendants each maintain, and at all times relevant to this claim maintained, liability insurance affording coverage to this action." Although this does not explicitly allege that the defendant had coverage for the full amount, on a motion to dismiss the pleadings are construed liberally and under such a liberal construction this is a sufficient allegation that the Town has liability insurance to cover the full amount of the requested damages. Therefore, we hold that the trial court did not err in denying the motion to dismiss as to this issue.

Dismissed in part and affirmed.

Judges GREENE and MARTIN, Mark D., concur.

RAYMOND L. BOONE, PLAINTIFF-APPELLANT v. WOODROW VINSON, JR., WILLIE ROBINSON AND ROANOKE-CHOWAN LOGGING COMPANY, INC., DEFENDANT-APPELLEES

No. COA96-1440

(Filed 4 November 1997)

Workers' Compensation § 46 (NCI4th)— 1994 injury to subcontractor—mandated coverage—exclusive remedy defense

The trial court properly granted summary judgment for defendants where plaintiff subcontracted with defendant

19. *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987).

20. 119 N.C. App. 44, 457 S.E.2d 902, *disc. review denied*, 341 N.C. 647, 462 S.E.2d 508 (1995).

21. *Id.* at 52-53, 457 S.E.2d at 907.

22. *Id.*

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Roanoke-Chowan Logging Company to transport timber; he was injured at a logging site on 21 January 1994; plaintiff did not have a workers' compensation policy covering himself and had not executed a written waiver of his right to workers' compensation coverage through Roanoke-Chowan; plaintiff filed an action to recover damages for his injuries; defendants moved to dismiss based on the exclusive remedy defense; and summary judgment was granted for defendants. By virtue of the mandated coverage for subcontractors under N.C.G.S. § 97-19 at the time of plaintiff's injury, the parties are subject to and bound by the Act, and defendants are entitled to the protection of the exclusive remedy provisions of N.C.G.S. § 97-9 and N.C.G.S. § 97-10.1.

Appeal by plaintiff from judgment entered by Judge Louis Meyer in Edgecombe County Superior Court. Heard in the Court of Appeals 25 August 1997.

On the morning of 21 January 1994 plaintiff drove his truck to the logging site of defendant Roanoke-Chowan Logging Company, Inc., to transport logs away from the site. Roanoke-Chowan was under a contract with Canal Wood Corporation to cut and transport timber, and Roanoke-Chowan had subcontracted with plaintiff to transport the timber. Defendant Woodrow Vinson, Jr., was president and manager of Roanoke-Chowan, and defendant Willie Robinson was an employee of Roanoke-Chowan.

While plaintiff was sitting in his truck waiting for the logging crew to arrive, defendant Robinson started a fire on the ground with limbs and scrap wood. Once the fire had started, plaintiff watched Robinson pour part of a bucket of diesel fuel on it as an accelerant. Plaintiff then got out of his truck and walked toward the fire. When he got to within eight or ten feet of the fire, he saw flames around the bucket and was worried that the "bucket might blow up." He threw a piece of wood to Robinson, and as he turned around to walk back to the truck, the fire "exploded" and shot flames towards him, severely burning the backs of his legs.

At the time of the accident Roanoke-Chowan had in force a workers' compensation insurance policy with North Carolina Forestry Association Self-Insurers' Fund, serviced by AEGIS Administrative Services. Plaintiff did not have a workers' compensation insurance policy covering himself, and prior to the accident, plaintiff did not execute a written waiver of his right to workers' compensation

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coverage through Roanoke-Chowan. Although Roanoke-Chowan planned to have him sign a waiver, a waiver form was not yet available before plaintiff was injured.

Roanoke-Chowan's workers' compensation carrier first denied benefits to plaintiff on 3 February 1995, asserting that plaintiff was an independent contractor, and the insurance policy did not provide benefits for independent contractors. Consequently, plaintiff filed a complaint and then an amended complaint in superior court against defendants to recover damages for his injuries. Defendants answered, alleging that plaintiff, as a subcontractor, was an employee of Roanoke-Chowan. Defendants moved to dismiss the case, *inter alia*, for lack of subject matter jurisdiction, based on the "exclusive remedy defense"—that plaintiff's exclusive remedy was under the Workers' Compensation Act. *See* N.C. Gen. Stat. §§ 97-9, -10.1, -19 (1991).

On 7 August 1995 plaintiff sent copies of the pleadings to defendant's workers' compensation carrier, which again denied his claim on the basis that plaintiff was an independent contractor. Subsequently, plaintiff filed a Form 33 request for hearing with the Industrial Commission, and defendants' insurance carrier responded with a Form 33R, denying both an employment relationship and compensability under the Workers' Compensation Act.

Pursuant to N.C. Gen. Stat. §§ 97-19 and -24(b) (1991), plaintiff waived in writing his right to workers' compensation benefits subject only to it being judicially determined that defendants are entitled to the exclusive remedy defense. Defendants filed a motion for summary judgment, based on depositions of plaintiff, defendant Vinson, and defendant Robinson, an affidavit of defendant Vinson, and plaintiff's responses to defendants' request for admissions. The trial court granted summary judgment in favor of defendants and dismissed all claims against them. Plaintiff appeals.

Braxton H. Bell and Mario E. Perez for plaintiff appellant.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for defendant appellees.

ARNOLD, Chief Judge.

Summary judgment is appropriate if a defending party can establish that no claim for relief exists or that the claimant cannot over-

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come an affirmative defense or legal bar to the claim. *Wilder v. Hobson*, 101 N.C. App. 199, 201, 398 S.E.2d 625, 627 (1990). In addition, when the only issues to be decided are issues of law, summary judgment is proper. *Brawley v. Brawley*, 87 N.C. App. 545, 548, 361 S.E.2d 759, 761 (1987), *disc. review denied*, 321 N.C. 471, 364 S.E.2d 918 (1988).

An injured person is entitled to compensation under the Workers' Compensation Act (hereinafter the Act) only if he is an employee of the party from whom compensation is claimed. *Richards v. Nationwide Homes*, 263 N.C. 295, 301-02, 139 S.E.2d 645, 649 (1965). The central issue in this case is whether an employer-employee relationship existed between Roanoke-Chowan and plaintiff, allowing defendants to invoke the exclusive remedy provisions of the Act, which preclude plaintiff from recovering damages in tort. *See* N.C. Gen. Stat. § 97-9, -10.1, -19 (1991). An employer-employee relationship at the time of the injury is a jurisdictional fact, on which this Court must make its own findings. *Doud v. K & G Janitorial Service*, 69 N.C. App. 205, 211, 316 S.E.2d 664, 669, *disc. review denied*, 312 N.C. 492, 322 S.E.2d 554 (1984).

The Act provides that a person who might not otherwise be covered may be deemed a "statutory employee" under certain circumstances, thereby subjecting him to coverage under the Act. *See* N.C. Gen. Stat. § 97-19 (1991); *Rich v. R. L. Casey, Inc.*, 118 N.C. App. 156, 158-59, 454 S.E.2d 666, 667, *disc. review denied*, 340 N.C. 360, 458 S.E.2d 190 (1995). The determinative issue, then, is whether plaintiff, as a subcontractor, was a statutory employee of Roanoke-Chowan when he was injured.

This case requires an interpretation of G.S. § 97-19 as it existed at the time of plaintiff's injury on 21 January 1994. The statute then in effect read:

Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by a workers' compensation insurance carrier, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor, stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable, irrespective of whether such subcontractor has regularly in service less than four employees

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in the same business within this State, to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of *any such subcontractor, and principal or partner of such subcontractor or any employee of such subcontractor* due to an accident arising out of and in the course of the performance of the work covered by such subcontract. . . . *If the subcontractor has no employees and waives in writing his right to coverage under this section*, the principal contractor, intermediate contractor, or subcontractor subletting the contract shall not thereafter be held liable for compensation or other benefits under this Article to said subcontractor. Subcontractors who have no employees are not required to comply with G.S. 97-93.

N.C. Gen. Stat. § 97-19 (1991) (emphasis added). N.C. Gen. Stat. § 97-93 (1991) provides that employers subject to the Act are required to carry insurance or prove financial ability to pay compensation. Plaintiff, as an independent subcontractor with no employees, is not required to comply with G.S. § 97-93. We also note that plaintiff did not waive in writing his right to coverage under G.S. § 97-19.

The General Assembly amended G.S. § 97-19, effective 5 August 1987, by inserting “any such subcontractor, any principal or partner of such subcontractor or” immediately preceding the phrase “any employee of such contractor” in the first sentence of the statute. *See Southerland v. B. V. Hedrick Gravel & Sand Co.*, 345 N.C. 739, 743, 483 S.E.2d 150, 152 (1997). Prior to the 1987 amendment, the statute was interpreted to protect the employees of a subcontractor, not the subcontractor himself. *Richards*, 263 N.C. at 302, 139 S.E.2d at 650.

The sole question, then, is whether the Act in effect at the time of plaintiff's injury extended workers' compensation benefits to subcontractors under the same conditions as it extended coverage to employees of subcontractors. We find the case of *Southerland v. B. V. Hedrick Gravel & Sand Co.*, 345 N.C. 739, 483 S.E.2d 150 (1997) controlling.

In *Southerland*, the plaintiff, an independent subcontractor, was injured at a construction site in December 1990 while he was performing roofing work under a subcontract with the defendant. Although he advised the defendant that he maintained workers' com-

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pensation insurance coverage, the defendant did not obtain from him or any other source a certificate of insurance. The *Southerland* Court interpreted the "clear and unambiguous" language of the statute in effect at the time of the plaintiff's injury and held that "[t]he 1987 amendment clearly extended the class of persons protected by this provision to include not only employees of the subcontractor but also the subcontractor himself." *Id.* at 744, 483 S.E.2d at 152.

We note that the broadened scope of liability under this statute was recently abrogated. In 1995 the General Assembly reinstated the pre-1987 language of G.S. § 97-19 by deleting "any such subcontractor, any principal or partner of such subcontractor or" preceding "any employee of such subcontractor," effective 10 June 1996. *See* 1995 N.C. Sess. Laws ch. 555, § 1.

We agree with defendants that by virtue of the mandated coverage for subcontractors under G.S. § 97-19 at the time of plaintiff's injury, the parties are subject to and bound by the Act, and defendants are entitled to the protection of the exclusive remedy provisions under G.S. §§ 97-9 and -10.1. Furthermore, we have reviewed plaintiff's contentions that Roanoke-Chowan cannot avail itself of the exclusive remedy defense because it failed to comply with the Act and find them without merit.

As in *Southerland*, then, "[s]ince plaintiff is a member of the class of subcontractors entitled to individual coverage under N.C.G.S. § 97-19 as it existed at the time of his accident, the statute extended workers' compensation benefits to plaintiff[.]" *Southerland*, 345 N.C. at 744, 483 S.E.2d at 153 (emphasis added).

Accordingly, we affirm summary judgment in favor of defendants.

Affirmed.

Judges WALKER and McGEE concur.

INLAND GREENS HOA v. DALLAS HARRIS REAL ESTATE-CONSTRUCTION

[127 N.C. App. 610 (1997)]

INLAND GREENS HOA, INC., CEDAR RIDGE AT INLAND GREENS, INC., JAMES W. SAWYER AND WIFE, EILEEN SAWYER, NORMAN RALPH PIPPIN AND WIFE, DOROTHY PIPPIN, PLAINTIFFS V. DALLAS HARRIS REAL ESTATE-CONSTRUCTION INCORPORATED, FRANKLIN L. BLOCK, TRUSTEE AND MABEL DUNN TRASK, DEFENDANTS

No. COA97-144

(Filed 4 November 1997)

Declaratory Judgment Actions §§ 20, 25 (NCI4th)— party previously dismissed—petition for supplemental relief—denominated a Rule 60 motion

The trial court did not err by granting defendant-Trask's motion for relief from a declaratory judgment pursuant to N.C.G.S. § 1A-1, Rule 60(b) where a developer (defendant Dallas Harris Real Estate-Construction) had executed a note and deed of trust to Trask; when most of the lots were sold, the developer notified the individual lot owners that it intended to sell a golf course which was included in the common areas; negotiations with the homeowners reached a stalemate; the homeowners' associations and two individual owners brought this action seeking a declaratory judgment of the interests of the respective parties with regard to the common areas; Trask was dismissed for lack of subject matter jurisdiction; the trial court granted a declaratory judgment in favor of plaintiffs which ordered that Trask's deed of trust be subordinate to any interest of plaintiffs in the common properties; and Trask filed a motion for relief, which was granted. Trask was entitled to relief from the declaratory judgment because she was not afforded an opportunity to be heard. Although the more appropriate course of action would have been to file a petition for supplemental relief under N.C.G.S. § 1-259 rather a Rule 60 motion for relief, the label or description a party puts on its motion does not control whether the party should be granted relief and plaintiffs suffered no prejudice since Trask was entitled to relief under the Declaratory Judgment Act.

Appeal by plaintiffs from judgment entered 7 November 1996 by Judge James E. Ragan, III in New Hanover County Superior Court. Heard in the Court of Appeals 7 October 1997.

INLAND GREENS HOA v. DALLAS HARRIS REAL ESTATE-CONSTRUCTION

[127 N.C. App. 610 (1997)]

Shipman & Associates, L.L.P., by Gary K. Shipman and C. Wes Hodges, II, for plaintiffs-appellants.

Block, Crouch, Keeter & Huffman, L.L.P., by Auley M. Crouch, III; and Gary E. Trawick; for defendant-appellee.

WALKER, Judge.

On 29 January 1990, Dallas Harris Real Estate-Construction, Inc. ("Dallas Harris") executed a note and deed of trust to Mabel Dunn Trask ("Trask") in the amount of three-million two-hundred fifteen thousand dollars (\$3,215,000.00) to secure the sale of certain property in New Hanover County. Dallas Harris developed this property to create two multi-family residential developments known as Inland Greens and Cedar Ridge at Inland Greens ("Cedar Ridge"). As Dallas Harris developed additional sections of Inland Greens and Cedar Ridge, Trask would release additional tracts of land from the deed of trust.

When Dallas Harris began developing the land, he recorded certain plats with the New Hanover County Register of Deeds which showed the location of the lots in each development, as well as all the common areas, amenities and recreational areas, including an 18-hole, par-3 golf course ("golf course"). In each subsequent conveyance of lots from the two developments, Dallas Harris referenced these plats for a more particular description. Furthermore, the lots contained in the two developments were subject to certain restrictive covenants. One of the restrictive covenants for Inland Greens granted to the lot owners a "right of first refusal" to buy the golf course if Dallas Harris decided to sell it within the first ten years.

By 1994, Dallas Harris had sold substantially all of the lots situated in the two developments. However, Trask claimed that Dallas Harris still owed her additional sums of money under the note and deed of trust, and she threatened foreclosure proceedings.

In July 1994, Dallas Harris notified the individual lot owners of both developments that he intended to sell the golf course, and that in accordance with the restrictive covenants, they had a right of first refusal to purchase the golf course before it was offered for sale to the public. Thereafter, Dallas Harris offered to sell the golf course to the lot owners at a price which reflected the golf course being subdivided and developed into additional lots. The lot owners then submitted a counteroffer to purchase the golf course at a price which

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reflected its continuing to be used as a golf course. When negotiations between the two parties reached a stalemate, Dallas Harris told the lot owners that they could look forward to additional development if they did not purchase the golf course.

Plaintiffs, in the current action, are the homeowners' associations for the two developments as well as two individual lot owners. They filed this complaint against Dallas Harris, Trask and John C. Collins, the trustee for the deed of trust, on 10 July 1995, seeking a declaratory judgment of the interests of the respective parties with regard to the common areas and amenities of the two developments, including the golf course. Trask and Collins were dismissed in February 1996 for lack of subject matter jurisdiction; however, the lawsuit between the lot owners and Dallas Harris continued.

After a hearing on the matter, the trial court granted a declaratory judgment in favor of the plaintiffs on 26 June 1996, in which it made the following conclusions of law:

4. The interests of the Plaintiffs and other members of the Associations is superior to any interest of Trask in and to the common property, areas, amenities and utilities for the developments, and the Golf Course.

...

6. Trask benefitted, by virtue of the payments made by Dallas Harris on the purchase money note and Deed of Trust referenced above by reason of the development scheme for Inland Greens and Cedar Ridge, which included the creation of the easements in favor of the Plaintiffs and other members of the Associations in and to the common property, areas, amenities and utility systems, and the Golf Course.

7. The Deed of Trust to Trask is subordinate to any interest of the Plaintiffs, and other lot owners within the developments similarly situated, to the common properties, open spaces, and the Golf Course.

The trial court then ordered that:

2. The Deed of Trust to Trask is subordinate to any interest of the Plaintiffs, and other lot owners within the developments similarly situated, to the common properties, open spaces and the Golf Course.

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Following the entry of the order, Trask filed a motion for relief from the declaratory judgment pursuant to Rule 60(b) of the N.C. Rules of Civil Procedure. Trask contended that the declaratory judgment purported to deprive her of valuable property rights by subordinating her deed of trust to "any interest of the plaintiffs, and other lot owners within the developments similarly situated, to the common properties, open spaces and the Golf Course." Further, she asserted that this deprivation of property rights, without proper notice, was violative of her due process rights, and was essentially a "fraud upon the Court." She requested that the trial court either strike the entire judgment as being void, or at least remove all references which purported to affect her property rights.

After hearing from both sides on the matter, the trial court granted Trask's motion for relief on 7 November 1996 and entered an amended declaratory judgment which struck the above-referenced conclusions and ordered that the declaratory judgment entered on 26 June 1996 should not apply to Trask.

Our Supreme Court has stated that:

It is axiomatic, at least in American jurisprudence, that a judgment rendered by a court against a citizen affecting his vested rights in an action or proceeding to which he is not a party is absolutely void and may be treated as a nullity whenever it is brought to the attention of the Court.

Card v. Finch, 142 N.C. 140, 144, 54 S.E. 1009, 1010 (1906). Further, our Courts have held that "[n]otice and an opportunity to be heard are prerequisites of jurisdiction . . . , and jurisdiction is a prerequisite of a valid judgment." *Comrs. of Roxboro v. Bumpass*, 233 N.C. 190, 195, 63 S.E.2d 144, 147 (1951) (citations omitted); *Jenkins v. Richmond County*, 99 N.C. App. 717, 721, 394 S.E.2d 258, 261 (1990), *disc. review denied*, 328 N.C. 572, 403 S.E.2d 512 (1991).

Since this was a declaratory judgment action, an appropriate remedy can be found under Article 26 of Chapter 1 of the N.C. General Statutes ("the Declaratory Judgment Act"). Within that Act, N.C. Gen. Stat. § 1-260 states that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings." N.C. Gen. Stat. § 1-260 (1996); *see also* W. Brian Howell, *Shuford North Carolina Civil Practice and Procedure* § 57-3 (4th ed. 1992). Further,

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when a “necessary party” to the action has not been joined in the action, the trial court should not proceed until the absent person is brought into the action as a party. *Construction Co. v. Board of Education*, 278 N.C. 633, 640, 180 S.E.2d 818, 822 (1971). A person is a necessary party when “he is so vitally interested in the controversy involved . . . that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party.” *Id.* at 639, 180 S.E.2d 818, 821-822 (*quoting Garrett v. Rose*, 236 N.C. 299, 307, 72 S.E.2d 843, 848 (1952)).

Since Trask was not afforded an opportunity to be heard, she was entitled to relief from the declaratory judgment. Although Trask brought her motion for relief under Rule 60(b), the more appropriate course of action would have been to file a petition with the trial court for supplemental relief under N.C. Gen. Stat. § 1-259, which provides that:

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

N.C. Gen. Stat. § 1-259 (1996).

“Nomenclature is not important. The label or description that a party puts on its motion does not control whether the party should be granted or denied relief” 12 James W. Moore et al., *Moore’s Federal Practice and Procedure* § 60.64 (3rd ed. 1997); *see also Carter v. Clowers*, 102 N.C. App. 247, 253, 401 S.E.2d 662, 665 (1991). Accordingly, we treat Trask’s Rule 60(b) motion as a petition for relief under N.C. Gen. Stat. § 1-259.

Although the trial court granted Trask relief under Rule 60(b), we find that plaintiffs suffered no prejudice since Trask was entitled to relief under the Declaratory Judgment Act. We therefore overrule this assignment of error.

Affirmed.

Judges WYNN and SMITH concur.

STRICKLAND v. CAROLINA CLASSIC CATFISH, INC.

[127 N.C. App. 615 (1997)]

JENNIE LOU STRICKLAND, MOTHER, AND JERRY STRICKLAND, FATHER OF GORDON G. STRICKLAND, EMPLOYEE, PLAINTIFF v. CAROLINA CLASSICS CATFISH, INC., EMPLOYER; NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, CARRIER; DEFENDANTS

No. COA97-75

(Filed 4 November 1997)

Workers' Compensation §§ 279, 304 (NCI4th)—death benefits—no survivors—commutation—interest—calculation

A workers' compensation award was remanded where an award was made by a deputy commissioner for the death of an employee without dependents; the award was affirmed by the Commission and ultimately affirmed by the North Carolina Supreme Court; defendants tendered payment to plaintiffs, with interest; plaintiffs moved to clarify the calculation of the award and contended that they were underpaid; defendants requested reimbursement of the amount it had tendered in excess of that required by statute; the Commission ordered that a sum be reimbursed to defendants; and it could not be discerned from the record exactly how the Industrial Commission computed the award and interest. N.C.G.S. § 97-40.

Appeals by plaintiffs and defendants from Opinion and Award of the North Carolina Industrial Commission filed 29 October 1996. Heard in the Court of Appeals 17 September 1997.

Law Offices of Roberta L. Edwards, by Roberta L. Edwards and Kenneth R. Massey, for plaintiff appellants.

Young, Moore and Henderson, P.A., by Joe E. Austin, Jr. and Dawn M. Dillon, for defendant appellants.

GREENE, Judge.

Jennie Lou Strickland and Jerry Strickland (plaintiffs) appeal from an Opinion and Award by the North Carolina Industrial Commission (Commission) awarding Carolina Classics Catfish, Inc. and North Carolina Farm Bureau Mutual Insurance Company (defendants) a reimbursement of \$6,162.42 for overpayment of a workers' compensation claim. Defendants cross-appeal from the same Opinion and Award.

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[127 N.C. App. 615 (1997)]

The facts in this case are as follows: In June 1990, Gordon Strickland, the plaintiffs' son, was killed after making a catfish delivery. Workers' compensation benefits were denied by the defendants. A hearing was held before a deputy commissioner of the Commission on 14 February 1991 and the deputy commissioner entered an Opinion and Award on 22 October 1992 awarding \$200 per week to the plaintiffs for 400 weeks. This Opinion and Award was affirmed by the Commission on 11 April 1994. After an appeal by the defendants, the Opinion and Award of the Commission was, on 9 February 1996, affirmed by the North Carolina Supreme Court. On 15 February 1996, the defendants tendered payment to the plaintiffs in the amount of \$70,017.38 for compensation and an additional sum of \$28,006.96 for interest. In April of 1996, the plaintiffs moved to clarify the calculation of the award contending that they were underpaid. The defendants made a cross-motion requesting a reimbursement of \$9,303.00 because the payment tendered on 15 February 1996 was in excess of that required by statute. In response to the motions the Commission ordered that the plaintiffs reimburse the defendants in the amount of \$6,162.52.

The issue is whether the portion of a workers' compensation award (for the death of an employee where there are no surviving whole or partial dependents) which compensates for the period of time between the initial workers' compensation hearing and the final determination by the appellate courts should be commuted to its present value as of the time of the initial hearing.

The North Carolina Workers' Compensation Act (Act) provides that compensation payments which are due because of the death of the employee will be paid for a period of 400 weeks from the date of the death of the employee. N.C.G.S. § 97-38 (1991). If there are no whole or partial dependants of the deceased employee, then the compensation which would be payable under section 97-38 must be commuted to its present value and paid in a lump sum to the next of kin. N.C.G.S. § 97-40 (Supp. 1996). The Act further provides: "[I]n any workers' compensation case in which an order issued either granting or denying an award to the employee and where there is an appeal resulting in an ultimate award to the employee, the insurance carrier or employer shall pay interest on the final award or unpaid portion thereof from the date of the initial hearing on the claim, until paid at the legal rate of interest provided in [N.C. Gen. Stat. §] 24-1." N.C.G.S. § 97-86.2 (1991). The first hearing before the deputy commissioner adjudicating the merits of the employee's claim is the "initial hearing

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on the claim” within the meaning of section 97-86.2. Section 97-86.2 allows employees to be compensated for the loss of the use of the money to which they are entitled while appeals are pending. *See Suggs v. Kelly Springfield Tire Co.*, 71 N.C. App. 428, 431, 322 S.E.2d 441, 443 (1984).

The plaintiffs contend that section 97-40 should be applied in this case as follows: (1) the compensation resulting from the period of time between the date of death of the employee and the final determination of liability (the Supreme Court opinion in this case) must be considered as accrued payments and not subject to commutation; and (2) compensation resulting from the period of time after the final determination of liability must be considered future payments and commuted to its present value. The interest on the amount of the award (computed in the above manner) must, according to the plaintiffs, be a separate inquiry and be assessed on the amount of the award “beginning from the date of the initial hearing” before the deputy commissioner (14 February 1991).

The defendants contend that sections 97-40 and 97-86.2 must be read *in pari materia* and in doing so the award and interest in this case must be determined in the following manner: (1) the compensation resulting from the period of time between the date of the employee’s death and the date of the initial hearing before the deputy commissioner (14 February 1991) is payable without commutation; (2) the compensation resulting from the period of time between the date of the initial hearing before the deputy commissioner and the date of the final determination (9 February 1996 decision by the Supreme Court) is to be commuted to its present value as of the date of the initial hearing; and (3) interest is to be computed on the total award due (computed in above manner) from the date of the initial hearing before the deputy commissioner.

There is merit to portions of both parties’ arguments. The plaintiffs’ argument as to the commutation of the award is more consistent with the directive of section 97-40 that the award be “commuted.” By definition it is only those payments due in the future that are subject to commutation or reduction to a discounted present value. *Black’s Law Dictionary* 281 (6th ed. 1990). Payments that have accrued or are presently due or past due are not subject to commutation.

In this case, at the time the Supreme Court rendered its opinion affirming the Opinion and Award of the Commission, the only pay-

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ments due in the future were those accruing after the date of the Supreme Court opinion. Thus, it was proper to commute only those payments due after the date of the Supreme Court opinion which required the defendants to make compensation payments to the plaintiffs. The payments due and not payable prior to the Supreme Court opinion were past accrued payments (not future payments) and thus not subject to commutation.

The defendants, however, are correct in their contention that to allow the plaintiffs to receive interest on the entire award (the commuted and uncommuted portions of the award) from the date of the initial hearing before the deputy commissioner would constitute a double recovery for the plaintiffs. This is so because the plaintiffs were not entitled to the full uncommuted award at the time of the initial hearing. The defendants obligation accrued weekly at the rate of \$200 each week. It follows, therefore, that the plaintiffs are *not* entitled to interest on the entire amount of the uncommuted award for the entire period of time extending from the date of the initial hearing before the deputy commissioner. The plaintiffs are only entitled to interest on the past due payments *as they became due*, with interest accumulating on the past due payments from the date of the initial hearing before the deputy commissioner.

From our review of the record we cannot discern exactly how the Commission computed the award and interest and remand is necessary for computation consistent with this opinion. The new Opinion and Award should delineate the compensation and interest portions of the award and indicate how these items were computed. Furthermore, the interest awarded must be paid in full to the plaintiffs and cannot be used to calculate the attorneys' fees. N.C.G.S. § 97-86.2.

Reversed and remanded.

Judges JOHN and TIMMONS-GOODSON concur.

SHILOH METHODIST CHURCH v. KEEVER HEATING & COOLING

[127 N.C. App. 619 (1997)]

SHILOH METHODIST CHURCH, PLAINTIFF V. KEEVER HEATING & COOLING CO.,
DEFENDANT

No. COA97-85

(Filed 4 November 1997)

1. Process and Service § 39 (NCI4th)— summons—initial service returned unserved—service within 30 days by certified mail—no endorsement or alias

The trial court erred by granting summary judgment for defendant based on an improper service of process and the running of the statute of limitations where the summons was issued on 8 October 1992; the initial summons was returned unserved; plaintiff served defendant by certified mail with a copy of the summons and complaint on 28 October 1992; defendant asserted the defense of improper service because there was no endorsement or alias or pluries summons; and plaintiff's subsequent service was beyond the three year statute of limitations. The service was by certified mail within thirty days of the issuance of the summons and was in accord with N.C.G.S. § 1A-1, Rule 4. The fact that there was a prior unsuccessful attempt at service is simply not material.

2. Courts § 74 (NCI4th)— service of process—motion to dismiss—denied by one judge—summary judgment—granted by another

The Court of Appeals agreed with plaintiff's alternative argument for reversing a summary judgment for defendant based on improper service and the running of the statute of limitations where another judge had denied the defense of improper service of process, treating it as a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6). Both judges considered only the pleadings and summonses and the second effectively overruled the first.

Judge JOHN concurring in the result.

Appeal by plaintiff from order dated 30 September 1996 by Judge Ronald E. Bogle in Catawba County Superior Court. Heard in the Court of Appeals 17 September 1997.

SHILOH METHODIST CHURCH v. KEEVER HEATING & COOLING

[127 N.C. App. 619 (1997)]

Golding, Meekins, Holden, Cosper & Stiles, L.L.P., by Lane Matthews, for plaintiff appellant.

Patrick, Harper & Dixon L.L.P., by David W. Hood, for defendant appellee.

GREENE, Judge.

Shiloh Methodist Church (plaintiff) appeals from an order granting Keever Heating and Cooling Co.'s (defendant) motion for summary judgment.

The relevant facts are as follows: On 8 October 1992, plaintiff filed a complaint alleging negligence (occurring in January 1991) on the part of the defendant. The clerk of court issued a summons to the defendant on 8 October 1992, the same day the complaint was filed. The defendant's principal place of business was in Taylorsville, Alexander County, North Carolina, but the summons was mistakenly sent to the Sheriff of Catawba County for service. The summons was returned unserved by the Sheriff of Catawba County on 12 October 1992 and placed in the court file. Instead of having an additional summons issued, the plaintiff served a copy of that summons (yellow in color) on the defendant along with the complaint by certified mail on 28 October 1992. An affidavit of service by certified mail was filed with the clerk of court on 4 November 1992 indicating that service had been achieved on 28 October 1992. On 18 December 1992 the defendant filed its answer to the complaint denying negligence and asserting the affirmative defense of improper service of process. On 11 April 1994 the plaintiff filed a voluntary dismissal without prejudice of its complaint and refiled it exactly one year later. A new summons was issued with the filing of the new complaint. Several alias and pluries summonses were issued and personal service was obtained on the defendant on 18 July 1995. Defendant filed an answer denying negligence and asserting the defense that the complaint should be dismissed "because it was not brought within the applicable statute of limitations." In November 1995 Judge Beverly Beal (Judge Beal) denied the defendant's defense that the complaint be dismissed, treating the defense as a N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) motion to dismiss. In August 1996 the defendant filed a N.C. Gen. Stat. § 1A-1, Rule 56 motion for summary judgment which was granted by Judge Ronald Bogle (Judge Bogle). The basis asserted for both the Rule 56 and Rule 12(b)(6) motions was that the 28 October 1992 service of process was not valid because it was made

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after the original summons was returned unserved and without an endorsement or the issuance of an alias or pluries summons. It follows, the defendant contended at trial, that because valid service did not occur until 18 July 1995, more than three years after the alleged negligent acts, the action was barred by the applicable three-year statute of limitations.

[1] The dispositive issue is whether a successful service of process occurring within thirty days after issuance of a summons is valid (in the absence of an endorsement, alias summons or pluries summons) if there has been a prior unsuccessful attempt at serving that same summons.

In this case there is no dispute among the parties, and we agree, that if service on the defendant on 28 October 1992 (by certified mail) was not valid, the plaintiff's claim is barred by the statute of limitations. This is so because the service on the defendant occurring on 18 July 1995 is beyond the three-year statute of limitations applicable to this case, N.C.G.S. § 1-52(16) (1996), and a N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) refiling (after a voluntary dismissal without prejudice) "does not breathe life into an action already barred by the statute of limitations." *Long v. Fink*, 80 N.C. App. 482, 486, 342 S.E.2d 557, 560 (1986) (quoting *Collins v. Edwards*, 54 N.C. App. 180, 183, 282 S.E.2d 559, 560 (1981)); N.C.G.S. § 1A-1, Rule 41(a)(1) (1990).

The parties do dispute whether the 28 October 1992 service was valid. The defendant argues that a summons "becomes dormant and unservable" once service of that summons is unsuccessfully attempted unless an endorsement or alias (or pluries) summons is timely issued. The plaintiff contends that any service consistent with N.C. Gen. Stat. § 1A-1, Rule 4(j) is valid provided it occurs within thirty days after the issuance of the summons, even if there are multiple attempts during that period of time and even though there is no endorsement or alias (or pluries) summons. We agree with the plaintiff.

As a general rule, personal or substituted service of a summons (in accordance with Rule 4(j)) "must be made within 30 days after the date of the issuance of [the] summons . . ." N.C.G.S. § 1A-1, Rule 4(c) (Supp. 1996) (sixty days allowed for service of summons for tax and assessment foreclosures). If the summons is not served within thirty days after its issuance, it becomes "dormant" and cannot effect service except that it be revived or "continued" by either "an endorsement upon the original summons . . . or . . . an alias or pluries sum-

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mons” N.C.G.S. § 1A-1, Rule 4(d); *County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 157-8, 323 S.E.2d 458, 461 (1984). If service of a summons is not had within the first thirty days after its issuance or revived pursuant to Rule 4(d) within the next sixty days the “action is discontinued.” N.C.G.S. § 1A-1, Rule 4(e); *Whitley*, 72 N.C. App. at 158, 323 S.E.2d at 461. If an action is discontinued and a new summons is later issued, a new action is begun on the date of the new summons and the statute of limitations is measured from the date of the new summons issue date. N.C.G.S. § 1A-1, Rule 4(e); *Whitley*, 72 N.C. App. at 158, 323 S.E.2d at 461; *Morton v. Insurance Co.*, 250 N.C. 722, 725, 110 S.E.2d 330, 332 (1959) (“The real purpose of the provisions of the law with respect to keeping up the chain of summonses is to maintain the original date of the commencement of the action”) (citation omitted).

In this case, the summons and complaint were served by certified mail within thirty days after the issuance of the summons. Service by certified mail is a service recognized by our Rules. N.C.G.S. § 1A-1, Rule 4(j)(1)(c). The fact that there was a prior unsuccessful attempt at service of the summons is simply not material. The service was thus in accordance with Rule 4 and therefore valid. Judge Bogle erred in granting summary judgment for the defendant on this basis.¹

Reversed and remanded.

Judge TIMMONS-GOODSON concurs.

Judge JOHN concurs in the result with separate opinion.

Judge JOHN concurring in the result.

As the majority properly observes in footnote number one, Judge Bogle’s grant of summary judgment to defendant on the basis of improper service of process effectively overruled the previous ruling of Judge Beal. It is well established that one superior court judge may not overrule another. *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). On this basis, I vote to reverse Judge Bogle’s entry of summary judgment and concur in the result reached by the majority.

[2] 1. The plaintiff asserts an alternative argument for reversing the summary judgment entered by Judge Bogle. It argues that Judge Bogle was without authority to grant summary judgment for the defendant on the same grounds that Judge Beal denied the defendant’s motion to dismiss. We agree. The record reveals that both

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[127 N.C. App. 623 (1997)]

RICHARD F. HARLOW AND JANE R. HARLOW, PLAINTIFFS V. VOYAGER COMMUNICATIONS V, CARL C. VENTERS AND JACK P. MCCARTHY, DEFENDANTS

No. COA96-1340

(Filed 4 November 1997)

1. Judgments § 166 (NCI4th)— multiple parties—default judgment against one—voluntary dismissal of others—not an adjudication of liability

An order entering a default judgment was vacated where plaintiffs sued three parties, including Voyager, for fraud; Voyager was found to be in contempt of a discovery order; the trial court ordered that default be entered against Voyager and that the case be put on for trial for all issues as to the other defendants and for damages only for Voyager; and plaintiffs voluntarily dismissed their claims against the remaining defendants without prejudice. Where a plaintiff alleges joint liability, a default judgment may not be entered against only one defendant if there are others who have not defaulted until there has been an adjudication of the liability of the non-defaulting defendants. A voluntary dismissal without prejudice does not constitute the required adjudication of the liability of the nondefaulting defendants.

2. Appeal and Error § 129 (NCI4th)— default judgment—trial set on damages—appeal interlocutory

An appeal from a default judgment (vacated on other grounds) was interlocutory where the trial court also ordered that the matter be set for trial on damages. An entry of default where damages remain to be determined is not a final order or final judgment.

Appeal by defendant-appellant Voyager Communications V from order entered 10 June 1996 by Judge Beverly Beal in Mecklenburg Superior Court. Heard in the Court of Appeals 21 August 1997.

judges considered only the pleadings and summonses. See 5A Wright and Miller, *Federal Practice and Procedure* § 1357 at 299 (2d ed. 1990) (in considering Rule 12(b)(6) motion trial court may consider pleadings and other “items appearing in the record of the case . . .”) (emphasis added). Accordingly, Judge Bogle effectively overruled Judge Beal and he did not have jurisdiction to do so. *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972).

HARLOW v. VOYAGER COMMUNICATIONS V

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Smith, Helms, Mulliss, & Moore, L.L.P., by Thomas D. Myrick and Maurice O. Green, for plaintiffs-appellees.

Thomas W. Steed, Jr. and Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by Rex C. Morgan, for defendant-appellant.

WYNN, Judge.

Following the filing of a complaint alleging joint liability against three defendants, the trial court in this case awarded default judgment against one of the defendants. Under North Carolina law, when a plaintiff alleges joint liability against multiple defendants of which only one defaults, a default judgment may not be entered against the defaulting defendant until after the court adjudicates the liability of the non-defaulting defendants. Because the trial court in this case entered default against the defaulting defendant before adjudicating the non-defaulting defendants' liability, we must vacate the order entering default judgment.

In April of 1995, Richard F. Harlow and Jane R. Harlow sued Voyager Communications V ("Voyager"), Carl C. Venters, and Jack P. McCarty alleging joint liability for fraud. In December 1995, after all defendants answered the complaint, the Harlows served defendant Voyager with discovery requests. Based on Voyager's failure to "fully comply" with their discovery requests, the Harlows moved the trial court to compel discovery and to impose sanctions.

In response, the trial court directed Voyager to produce all documents responsive to the Harlows' discovery requests by 24 May 1996 and to make itself available for a further deposition. On that date, Voyager produced some, but not all responsive documents. Additionally, Voyager did not attend the deposition.

On 10 June 1996, the trial court found Voyager in contempt of its earlier order and further ordered that: (1) Voyager's answer be stricken in its entirety, (2) default be entered against Voyager, (3) Voyager pay plaintiffs \$500.00 for costs, and (4) the clerk put the case on for trial for damages only as to Voyager and for all issues as to the other defendants. On 5 July 1996, nearly a month after the award of default judgment against Voyager, the Harlows voluntarily dismissed their claims without prejudice against the remaining defendants. Voyager appeals from the 10 June 1996 order.

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[1] Although neither party addressed the dispositive issue in their briefs, existing case law compels the result in this case. In *Moore v. Sullivan*,¹ we held that where a plaintiff alleges joint liability in the complaint, a default judgment may not be entered against only one of the defendants, if there are other defendants who have not defaulted, *until* there has been an adjudication of the liability of the non-defaulting defendants.²

In the present case, the Harlows alleged joint and several liability against the three defendants. The trial court awarded default judgment against one of the defendants, Voyager, on 10 June 1996. At that time, the liability of the remaining two defendants had not been adjudicated. Therefore, the trial court prematurely awarded default judgment against Voyager, and we must vacate the trial court's order and remand for a determination of whether the liability of the remaining defendants has been adjudicated.

We also note that subsequent to the entry of default the plaintiffs took a voluntary dismissal without prejudice of their claims against the other defendants. This action does not constitute the required adjudication of the liability of the non-defaulting defendants. First, it occurred after the entry of the default, and under these circumstances a party should not be allowed to correct the trial court's error by its unilateral action. Moreover, the entrance of a voluntary dismissal is neither an adjudication nor tantamount to an adjudication. By taking a voluntary dismissal without prejudice, plaintiffs reserved the option of reinstating the claim at a later time period. The record in this case does not reveal even now whether that option was exercised. If a plaintiff desires a speedy adjudication against non-defaulting defendants, action equivalent to an adjudication, such as taking a voluntary dismissal with prejudice, must be taken prior to the award of default judgment. In its absence, a default judgment may not be entered against a defaulting defendant that is alleged to have been jointly liable with other non-defaulting defendants.

[2] Finally, even if the default judgment was properly before us, we would find this appeal to be interlocutory. The record indicates that following the entry of default, the trial court ordered this matter set for trial on the issue of damages. An entry of default where damage

1. 123 N.C. App. 647, 473 S.E.2d 659, 661 (1996).

2. *Id.* at 650, 473 S.E.2d at 661; *see also Leonard v. Pugh*, 86 N.C. App. 207, 210-11, 356 S.E.2d 812, 815 (1987).

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remain to be determined is not a final order or a final judgment,³ and is not reviewable on appeal.⁴

Vacated and Remanded.

Judges GREENE and MARTIN, Mark D., concur.



KATHLEEN GARRETT WOODY, PLAINTIFF v. ORVILLE GENE WOODY, DEFENDANT

No. COA97-51

(Filed 4 November 1997)

**1. Evidence and Witnesses § 2410 (NCI4th)— child custody—
number of witnesses limited—abuse of discretion**

The trial court abused its discretion in a child custody proceeding, where the best interest of the child is the “polar star,” by limiting the number of witnesses and refusing to permit plaintiff to offer rebuttal evidence. If the evidence becomes cumulative, then it is entirely appropriate for the trial judge to limit the number of witnesses and to then permit the additional witnesses to be tendered for questioning by the court and the other party.

**2. Divorce and Separation § 346 (NCI4th)— child custody—
requirements—legitimation of another child**

A child custody restriction that the plaintiff’s illegitimate child be properly legitimated was inappropriate. Whether the other child has been legitimated is completely irrelevant.

Appeal by plaintiff from orders entered 15 May 1996 and 21 August 1996 by Judge J. Patrick Exum in Lenoir County District Court. Heard in the Court of Appeals 16 September 1997.

Arnold O. Jones, II for plaintiff-appellant.

Gerrans, Foster & Sergeant, P.A., by William W. Gerrans, for defendant-appellee.

3. *Duncan v. Duncan*, 102 N.C. App. 107, 111, 401 S.E.2d 398, 400 (1991); *Pendley v. Ayers*, 45 N.C. App. 692, 694, 263 S.E.2d 833, 834 (1980).

4. *Duncan*, 102 N.C. App. at 111, 401 S.E.2d at 400.

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WALKER, Judge.

Plaintiff and defendant were married on 29 July 1989 and separated on 2 March 1992. One child, Mary Christanna Woody, was born of the marriage on 14 February 1992. On 18 November 1993, the parties entered into a separation agreement and property settlement and were subsequently divorced on 29 November 1993. Plaintiff filed this action seeking child custody, child support and attorney fees on 5 January 1996. Defendant counterclaimed on the same three actions.

On 15 May 1996, the trial court entered an order granting the defendant primary custody of the child. Plaintiff moved for a new trial and this motion was denied.

[1] Plaintiff's sole assignment of error is that the trial court erred in refusing to allow her to call a rebuttal witness.

Prior to the hearing of this matter, the trial judge discussed with counsel his usual practice of limiting the number of witnesses in a custody case to four witnesses for each party. The trial transcript contains the following: "[The] court did discuss with counsel in chambers it's a general practice of some limitational numbers of witnesses; I believe that was also agreed to, four for each side including the parties barring any unforeseen circumstance"

During plaintiff's case in chief, she presented evidence from Orville Gene Woody, Jr. (the defendant), Ellen Sowers Garrett, Marvin Edwards Dunn, Jr. and herself. Only the plaintiff testified as to the cleanliness of the child, stating that she regularly bathed and changed the child's clothes in 1993. The defendant presented evidence from Jennifer Thompson, Barbara Hinson, Linda Woody and himself. Three of these witnesses testified that the child, while in the custody of the plaintiff in early 1993, exhibited sub-standard cleanliness and looked like she was not bathed regularly.

Plaintiff requested permission to offer rebuttal testimony from an additional witness concerning the child's cleanliness in 1993. The motion was denied since the trial court determined that plaintiff had previously presented evidence from "four witnesses." In the 21 August 1996 order denying plaintiff's motion for a new trial, the trial court concluded that "the trial court is vested with discretion to limit the number of witnesses called at a [c]ivil trial," citing *Ange v. Ange*, 54 N.C. App. 686, 284 S.E.2d 187 (1981) as authority.

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Although the trial court correctly quoted from the *Ange* case, we find the instant case to be factually and procedurally distinguishable from *Ange*. In *Ange*, the plaintiff called five witnesses who gave testimony as to plaintiff's inability to make a deed and was prepared to call thirteen more witnesses. The trial court then instructed plaintiff's counsel not to call any more witnesses who would " 'say the same thing the last five said.' " However, plaintiff's counsel, after informing the court that these witnesses would say the same thing as the others, tendered the additional witnesses to the court for cross-examination. *Id.* at 687, 284 S.E.2d at 187.

In contrast, here the trial judge advised counsel of his usual practice of limiting the number of witnesses to four for each party "barring any unforeseen circumstance." It is apparent from the record that plaintiff did not anticipate her care of the child in 1993 was going to be at issue such that three of defendant's witnesses would testify that the child exhibited sub-standard cleanliness and looked as if she were not regularly bathed during this period of time. In view of this evidence, we believe the trial court abused its discretion in refusing to permit the plaintiff to offer additional evidence. If during the trial the evidence becomes cumulative, then it is entirely appropriate for the trial judge to limit the number of witnesses as the court did in *Ange* and to then permit the additional witnesses to be tendered for questioning by the court and the other party.

In a custody proceeding where the best interest of the child is the "polar star," we conclude it was an abuse of discretion for the trial court to limit the number of witnesses and refuse to permit plaintiff to offer rebuttal evidence, entitling plaintiff to a new hearing. *See Witherow v. Witherow*, 99 N.C. App. 61, 392 S.E.2d 627 (1990); *Campbell v. Campbell*, 63 N.C. App. 113, 304 S.E.2d 262, *disc. review denied*, 309 N.C. 460, 307 S.E.2d 362 (1983); *Wilson v. Williams*, 42 N.C. App. 348, 256 S.E.2d 516 (1979) (The best interest of the child is the paramount consideration which must guide the court in awarding custody of a minor child).

[2] In addition, the trial court, in its 15 May 1996 order, found that:

[T]he plaintiff is a fit and proper person to have secondary custody or visitation with Mary [Christanna] Woody on the conditions that: first, her illegitimate child, Nicholas Robert Dunn, be properly legitimated. Secondly, no male person not related to the plaintiff by blood or marriage and specifically, Marvin E. Dunn, Jr., shall spend any time with plaintiff in the presence of the

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minor child, Christy, except when the plaintiff's parents are present in the home and that third, Marvin E. Dunn, Jr., not to be in the physical presence of the minor child, Mary [Christanna] Woody, except when the plaintiff's parents are present in the home.

Whether Nicholas has been legitimated is completely irrelevant to plaintiff's visitation with the child. In our view, this restriction was inappropriately included in the custody order.

The decision of the trial court is

Reversed.

Judges WYNN and SMITH concur.

A. RON VIRMANI, MD, PLAINTIFF v. PRESBYTERIAN HEALTH SERVICES CORP.,
DEFENDANT; IN RE KNIGHT PUBLISHING COMPANY D/B/A THE CHARLOTTE
OBSERVER AND JOHN HECHINGER

No. COA96-1051

(Filed 18 November 1997)

1. Hospitals and Medical Facilities or Institutions § 40 (NCI4th); Records of Instruments, Documents, or Things § 1 (NCI4th)—hospital staff privileges—peer review materials—introduction in civil proceeding—public records—court's right to deny public access

Even if physician peer review materials became public records under N.C.G.S. Chapter 132 once they were introduced by defendant hospital as evidence in an action regarding a physician's hospital staff privileges, the trial court was not divested of its inherent supervisory power over court records and proceedings and was not absolutely required by Chapter 132 to allow unfettered public access to the medical peer review committee materials. N.C.G.S. § 132-1.

2. Courts § 131 (NCI4th)—closing court proceedings—sealing records—not prohibited by statute

The statute which prevents the sealing of records "required to be open to public inspection" and prohibits a court from

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restricting the publication of reports regarding matter presented “in open court,” N.C.G.S. § 7A-276.1, does not prohibit a trial court from closing the court proceedings and sealing the records.

3. Constitutional Law § 128 (NCI4th)— closing court proceedings—sealing records—constitutional limitations

A trial court's discretion to close court proceedings and to seal court records is subject to constitutional limitations.

4. Constitutional Law § 128 (NCI4th); Hospitals and Medical Facilities or Institutions § 40 (NCI4th)— medical review committee records—shielding statute—constitutional right of access by public

The General Assembly's enactment of the statute that shields hospitals and professional health services providers from third party attempts to acquire medical review committee records and materials in the context of a civil action, N.C.G.S. § 131E-95, cannot supercede the constitutional rights of access held by the public.

5. Constitutional Law § 128 (NCI4th); Hospitals and Medical Facilities or Institutions § 40 (NCI4th)— hospital staff privileges—civil court proceedings—open courts provision—presumption of right of public access

The open courts provision of Art. I, § 18 of the North Carolina Constitution creates a strong presumption that the public, including a newspaper, has a right of access to civil court proceedings regarding the suspension of a physician's hospital staff privileges, including videotapes and transcripts of the proceedings and medical peer review committee records and materials considered by the court. However, there are some circumstances when a court may close civil proceedings and seal court records.

6. Constitutional Law § 128 (NCI4th)— closing court proceedings—sealing records—consideration by court—presumption of open access

In deciding whether to close court proceedings or seal court records, a court must balance competing interests and policies at stake in light of the particular circumstances of the case but must give substantial weight to the presumption of open access. A court must keep in mind the nature of the protection provided by the open courts provision, including the protection of the court's own integrity as an institution, and the relationship the open

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courts clause has to the interests protected by other clauses of Art. I, § 18 providing court access rights to litigants. The court should determine whether any of the competing interests and policies are so compelling that they overwhelmingly outweigh the strong presumption that court proceedings and records should be open to the public, and any closure or sealing order should be exceedingly narrow in scope.

7. Constitutional Law § 128 (NCI4th); Hospitals and Medical Facilities or Institutions § 40 (NCI4th)— hospital staff privileges—civil action—closing to public—sealing of peer review materials—erroneous orders

The trial court's orders closing the court proceedings and sealing peer review committee materials in an action regarding suspension of a physician's hospital staff privileges constituted reversible error since the public policy interest in the confidentiality of medical peer review committee records and materials is counterbalanced by the public's interest in being fully informed about plaintiff physician's challenge to defendant hospital's assessment of his competency and suspension of his staff privileges; there is a strong presumption of open access to traditionally open court proceedings; the peer review materials were voluntarily introduced by defendant hospital; and public access to these materials does not significantly impede defendant's right of access to the courts.

8. Constitutional Law § 128 (NCI4th)— hospital staff privileges—motion to keep proceedings open—summary denial—violation of open courts provision

The trial court erred by summarily denying a newspaper's motion to keep open to the public proceedings regarding the suspension of a physician's hospital staff privileges. Under Art. I, § 18 of the North Carolina Constitution, the trial court was required (1) to furnish the newspaper a meaningful opportunity to be heard on its motion, and (2) to state reasons for its ruling supported by specific findings.

9. Parties § 61 (NCI4th)— permissive intervention—newspaper—challenge to closing proceedings to public—common question of law or fact

A newspaper met the requirement of a common question of law or fact for permissive intervention under Rule 24(b) in an action regarding the suspension of a physician's hospital staff

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privileges where the newspaper challenged the validity of orders closing court and sealing medical peer review materials in the main action in response to defendant hospital's motion. N.C.G.S. § 1A-1, Rule 24(b).

Upon writ of certiorari allowed through petition by Knight Publishing Company d/b/a The Charlotte Observer and John Hechinger from orders entered 24 January 1996 by Judge Marvin K. Gray, 9 February 1996 by Judge James U. Downs, 10 May 1996 by Judge Marcus L. Johnson, and 15 May 1996 and 22 May 1996 by Judge James U. Downs in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 May 1997.

No brief filed for plaintiff, A. Ron Virmani, MD.

Johnston, Taylor, Allison & Hord, by Patrick E. Kelly and Greg C. Ahlum, for defendant.

Waggoner, Hamrick, Hasty, Monteith and Kratt, PLLC, by John H. Hasty and G. Bryan Adams, III, for appellants Knight Publishing Company d/b/a The Charlotte Observer and John Hechinger.

Everett Gaskins Hancock & Stevens, by Hugh Stevens and C. Amanda Martin, on behalf of The North Carolina Press Association and The News and Observer Publishing Company, amicus curiae.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Julian D. Bobbitt, Jr., on behalf of The North Carolina Hospital Association and The North Carolina Medical Society, amicus curiae.

McGEE, Judge.

This appeal presents the issue of whether the trial court erred in closing courtroom proceedings to the public and in sealing various documents presented to the court in a civil action filed by Dr. Ron Virmani (Dr. Virmani) against Presbyterian Health Services Corp. (Presbyterian) regarding suspension of Dr. Virmani's medical staff privileges at Presbyterian Hospital in Charlotte.

Shortly after Dr. Virmani filed this action, Presbyterian, in various pre-trial motions, moved to seal confidential medical peer review committee records and materials and to close court proceedings in

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which these records and materials were introduced or discussed. The motions were granted pursuant to N.C. Gen. Stat. § 131E-95 in various court orders. On 3 April 1996, *The Charlotte Observer* published a story by reporter John Hechinger about Dr. Virmani based on documents Hechinger obtained from the court file. The parties dispute whether these documents had been ordered sealed. On 7 May 1996, Hechinger attended a calendared hearing on Dr. Virmani's motion for summary judgment and on Presbyterian's motions to dismiss and for summary judgment. Early in the hearing, Presbyterian's attorneys moved to close the courtroom pursuant to G.S. § 131E-95 because they anticipated discussion of confidential medical peer review committee materials. The trial court ordered portions of the hearing concerning the medical peer review materials closed to the public. Prior to discussion of the peer review materials, the trial court asked Hechinger to identify himself. Hechinger answered, objected to closing of the hearing, and asked for a continuance in order that he could obtain counsel to argue against closure. The court noted his objection and denied the continuance. Hechinger complied with the closure by exiting the courtroom.

The next morning an attorney for Knight Publishing d/b/a The Charlotte Observer and Hechinger (jointly Knight) appeared before the trial court and presented written motions for intervention and to open the proceedings to the public and the news media. The trial court summarily denied the motions without hearing argument and without making findings of fact or conclusions of law. Presbyterian's attorneys were not present; however, Knight's attorney served a copy of the motions on the law partner of an attorney representing Presbyterian who was present for another matter.

In an order entered 10 May 1996, the trial court referenced Knight's motions and effectively, although not explicitly, denied the motions. Subsequent orders were entered sealing videotapes, tapes, and transcripts of those portions of the previously closed court proceedings in which medical peer review committee and physician credentialing matters were discussed, presented or argued. Knight filed a notice of appeal and petitions for various extraordinary writs including a petition for writ of certiorari with this Court.

By order entered 24 July 1996, our Court allowed the writ of certiorari as to the orders that (1) sealed confidential information and medical peer review committee records and materials that were considered by the court and/or were in the court file, (2) closed the court

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proceedings dealing with confidential medical peer review committee records and materials, (3) sealed portions of transcripts and videotapes of the court proceedings, and (4) denied Knight's motions to intervene and to open court proceedings.

PUBLIC RECORDS

We first address what right Knight has to attend courtroom proceedings and to review the sealed records in this civil action. Knight asserts access rights under N.C. Gen. Stat. §§ 132-1 and 7A-276.1, Article I, § 18 of our North Carolina Constitution, and the First Amendment of the United States Constitution.

Knight contends the peer review documents and testimony regarding the peer review process are public records under G.S. § 132-1. At common law, citizens have a "right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 55 L. Ed. 2d 570, 579 (1978); *see also News and Observer v. State; Co. of Wake v. State; Murphy v. State*, 312 N.C. 276, 280, 322 S.E.2d 133, 136 (1984). However, this right is not absolute. *Nixon*, 435 U.S. at 598, 55 L. Ed. 2d at 580; *News and Observer*, 312 N.C. at 280, 322 S.E.2d at 136. The United States Supreme Court has stated:

Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case" . . . Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption . . . or as sources of business information that might harm a litigant's competitive standing. . . .

Nixon, 435 U.S. at 598, 55 L. Ed. 2d at 580.

Access to public records in this State is governed by Chapter 132, which provides for liberal access. *See* G.S. § 132-1 *et. seq.*; *News and Observer*, 312 N.C. at 281, 322 S.E.2d at 137. Under Chapter 132 "public records" are those types of documents enumerated in G.S. § 132-1 "made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions." G.S. § 132-1 (1995). An "[a]gency of

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North Carolina government or its subdivisions” is defined broadly in the statute as “every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.” G.S. § 132-1. The breadth of this definition suggests it is inclusive of our state courts. In addition, in *State v. West*, 31 N.C. App. 431, 448, 229 S.E.2d 826, 835-36 (1976), *aff’d*, 293 N.C. 18, 235 S.E.2d 150 (1977), an action was brought by the State of North Carolina to recover property of the State, being bills of indictment filed in a North Carolina colonial district superior court in 1767 and 1768. Our Court held the bills of indictment were public records. *West*, 331 N.C. App. at 448, 229 S.E.2d at 835-36. “The trial court having found that the bills of indictment were docketed in the Salisbury District Superior Court, it follows without question that they became public records” *Id.* Thus, the term “public records” appears to include “all documents, papers . . . or other documentary material,” as defined in G.S. § 132-1, “made or received pursuant to law or ordinance in connection with the transaction of public business” by any North Carolina court.

However, here the trial court orders were based on G.S. § 131E-95. This statute shields hospitals and professional health services providers from third party attempts to acquire medical review committee records and materials in the context of a civil action. Knight acknowledges that G.S. § 131E-95 expressly provides these records and materials are not public records within the meaning of G.S. § 132-1(b). However, Knight asserts that, in spite of this statute, these records and materials became public records once they were introduced by defendant as evidence in the public forum of this civil action. G.S. § 131E-95 does not explicitly address the impact of a hospital’s or professional health services provider’s decision to present medical review committee materials as evidence in a civil action. In fact, the legislative decision reflected in G.S. § 131E-95 to protect professional health services providers and hospitals from discovery or introduction of this material into evidence is based on the implicit assumption that the material becomes public once it is introduced into a court proceeding.

[1] In a case addressing a similar issue, our Supreme Court held that records exempt from public records status pursuant to N.C. Gen. Stat. § 114-15 do not continue to be exempt once they become records of another state agency whose records are public under

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G.S. § 132-1. *News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 474, 412 S.E.2d 7, 12-13 (1992). Of course, here the medical peer review committee materials were not actually made available to the public as occurred in *Poole* because Presbyterian presented materials to the court in conjunction with the orders closing the proceedings and sealing the record. However, even if the peer review materials became public records under Chapter 132 once they were introduced by Presbyterian as evidence in this action, this occurrence did not divest the trial court issuing the orders in this action of its inherent supervisory power over court records and proceedings and it was not absolutely required by Chapter 132 to allow unfettered public access to the medical peer review committee materials.

STATUTORY PROVISION

[2] Knight further asserts N.C. Gen. Stat. § 7A-276.1 prohibited the court from closing the court proceedings and sealing the records. We disagree. This statute provides:

No court shall make or issue any rule or order banning, prohibiting, or restricting the publication or broadcast of any report concerning any of the following: any evidence, testimony, argument, ruling, verdict, decision, judgment, or other matter occurring in open court in any hearing, trial, or other proceeding, civil or criminal; and no court shall issue any rule or order sealing, prohibiting, restricting the publication or broadcast of the contents of any public record as defined by any statute of this State, which is required to be open to public inspection under any valid statute, regulation, or rule of common law. If any rule or order is made or issued by any court in violation of the provisions of this statute, it shall be null and void and of no effect, and no person shall be punished for contempt for the violation of any such void rule or order.

G.S. § 7A-276.1 (1995). This statute only prevents sealing of those records “required to be open to public inspection under any valid statute, regulation, or rule of common law.” *See* G.S. § 7A-276.1. In addition, this statute only prohibits a court from restricting the publication of reports regarding matter presented “in open court.” *See* G.S. § 7A-276.1. Thus, although court records may generally be public records under G.S. § 132.1, based on its inherent power to control court proceedings, a trial court may, in the proper circumstances, shield portions of court proceedings and records from public view subject to statutory and constitutional limitations.

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OPEN COURTS PROVISION

[3],[4] However, a trial court's discretion to close court proceedings and to seal records is subject to constitutional limitations. In addition, the court's application and consideration of G.S. § 131E-95 is not dispositive of Knight's rights because the General Assembly's enactment of G.S. § 131E-95 cannot supercede the constitutional rights of access held by the public. Acts of the General Assembly, to be valid and effective, must be enacted in conformity with both our federal and state constitutions. *See In re Advisory Opinion In re House Bill No. 65*, 227 N.C. 708, 713, 43 S.E.2d 73, 76 (1947); *Brumley v. Baxter*, 225 N.C. 691, 696, 36 S.E.2d 281, 284-95 (1945). Here, Knight does not assert that G.S. § 131E-95 is unconstitutional as written; rather, it contends the statute must not be applied or construed by the trial courts and by this Court in a manner which violates Knight's constitutional rights.

Knight contends Article I, § 18 of our North Carolina Constitution creates a presumption that all court proceedings, including the civil trial proceedings at issue here, are open to the public. Where the meaning of a constitutional provision is clearly expressed, it should be adopted; but, if doubtful, intention of those adopting the Constitution must be sought. *Elliott v. Board of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 921 (1932). "Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation." *Sneed v. Board of Education*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980). "The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected." *State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944).

[A] constitution is intended to be a forward-looking document . . . ; and where its terms will permit, is to be credited with a certain flexibility which will adapt it to the continuous growth and progress of the State. But when the Constitution provides how orderly progress may be fostered and advanced, and the process involves political rights reserved or expressly secured to the people, the courts will be careful not to encroach on that prerogative

Purser v. Ledbetter, 227 N.C. 1, 5-6, 40 S.E.2d 702, 706 (1946) (citations omitted). The Constitution should receive a liberal interpreta-

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tion in favor of a citizen, especially with respect to those provisions which are designed to safeguard the liberty and security of the citizen in regard to both person and property. *State v. Harris*, 216 N.C. 746, 764-65, 6 S.E.2d 854, 866 (1940).

Article I, § 18 of the North Carolina Constitution provides: "Sec. 18. Courts shall be open. All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18. The open courts provision was added to the Declaration of Rights of our State Constitution in 1868 as Article I, § 35 (now Article I, § 18). *See* John V. Orth, *The North Carolina State Constitution* 54 (1993); N.C. Const. art. I, § 35 (1868); 5 Francis N. Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies now or heretofore forming The United States of America* 2803 (1909). The surviving records of the 1868 North Carolina Constitutional Convention reveal neither the origin of our open courts provision nor the framers' intent in adding it to the Declaration of Rights. *See Journal of the Constitutional Convention of the State of North Carolina At Its Session 1868* at 169-71, 213-16, 226-32 (Raleigh: Joseph W. Holden, Convention Printer, 1868) (1868 Journal); *see also* Joseph W. Holden, Convention Proceedings, *North Carolina Standard* (providing day-to-day coverage of convention proceedings). The changes made to this provision in the 1971 Constitution were stylistic, not substantive. Robert L. Farb, *The Public's Right to Attend Criminal Proceedings in North Carolina*, Administration of Justice Memoranda, February 1980, at 6 n.15; *cf.* Report of the North Carolina State Constitution Study Commission 30 (Raleigh 1968).

The committee that drafted the 1868 Declaration of Rights was chaired by David Heaton of Ohio, a lawyer who served in the Ohio Senate before he moved to North Carolina in 1863. *See* 1868 Journal at 169, 213; Max Williams, *David Heaton*, 3 Dictionary of North Carolina Biography 91 (William S. Powell ed., 1988). Some scholars have suggested that our open courts provision was copied from the nearly identical provision of the 1851 Ohio Constitution and/or from the 1838 Pennsylvania Constitution. *See* Farb, *supra*, at 6; Dillard S. Gardner, *The Proposed Constitution for North Carolina*, Popular Government, June 1934, at 4; *see also* Hugh T. Lefler & Albert R. Newsome, *The History of a Southern State: North Carolina* 490 (3rd ed. 1973).

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The constitutions of thirty-eight states contain open courts or right to remedy provisions and twenty-two state constitutions require that their state courts be “open.” William C. Koch, Jr., *Reopening Tennessee’s Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. Mem. L. Rev. 333, 434-35 (1997). Many state constitutions contain some type of open courts provision *and* some type of right to remedy provision. *Cf. id.*

The U.S. Supreme Court, citing the writings of Sir Edward Coke and Blackstone, among others, has observed that English commentators on the common law assumed the common law rule was that the public could attend both civil and criminal trials. *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n. 15, 61 L. Ed. 2d 608, 625 n.15 (1979). The writings of Sir Edward Coke, 17th century English judge and legal writer, had a profound influence on the American colonists and on the development of state constitutions. *See Koch, supra*, at 363; Jack B. Harrison, *How Open Is Open? The Development of the Public Access Doctrine Under State Open Court Provisions*, 60 U. Cin. L. Rev. 1307, 1310-12 (1992). Coke wrote four volumes of *Institutes* which were among the few summaries of English law available in the American colonies. Koch, *supra*, at 364; Jonathan M. Hoffman, *By the Course of Law: The Origin of the Open Courts Clause of State Constitutions*, 74 Or. L. Rev. 1279, 1296 (1995). In his commentary on the first chapter of the Statute of Marlebridge (also Marlborough) in his *Second Institutes*, Coke expounded on this chapter’s provision that “all persons, as well of high as of low estate, shall receive justice in the king’s court.” He comments on the meaning of “[i]n curia domini regis” (in the king’s court) as follows:

In curia domini regis. These words are of great importance, for all causes ought to be heard, ordered, and determined before the judges of the kings courts openly in the kings courts, whither all persons may resort; and in no chambers, or other private places: for the judges are not judges of chambers, but of courts, and therefore in open court, where the parties councell and attorneys attend, ought orders, rules, awards, and judgements to be made and given, and not in chambers or other private places, where a man may lose his cause, or receive great prejudice, or delay in his absence for want of defence. Nay, that judge that ordereth or ruleth a cause in his chamber, though his order or rule be just, yet offendeth he the law, (as here it appeareth) because he doth it not in court. . . Neither are causes to be heard

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upon petitions, or suggestions and references, but *in curia domini regis*.

1 Edwardo Coke, *The Second Part of the Institutes of the Laws of England* 103-104 (London, E. & R. Brooke 1797); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565 n.6, 65 L. Ed. 2d 973, 982 n.6 (1980) (plurality opinion) (discussing Coke's interpretation of the Statute of Marlborough and quoting his commentary on "[i]n curia domini regis").

State constitution open courts provisions also have historical roots in Coke's commentary on Chapter 29 of the 1225 Magna Carta in his *Second Institutes*. See Hoffman, *supra*, at 1284, 1295 n. 104. Hoffman asserts that a primary theme of Coke's interpretation of the Magna Carta was the integrity of the courts as protected by the Magna Carta's guarantee of an independent and impartial judiciary. See Hoffman, *supra*, at 1288. Coke's influence on the American colonies is reflected in the writings of William Penn, who drafted the *Fundamental Laws of West New Jersey* in 1676 and drafted the *Frame of Government of Pennsylvania—1682*, see Koch, *supra*, at 364-65, in which he combined a shorthand version of the open courts concept with the Magna Carta prohibition on the sale and delay of justice as follows: "[t]hat all courts shall be open, and justice shall neither be sold, denied nor delayed." Cf. *Frame of Government of Pennsylvania—1682, Laws Agreed Upon In England*, 5 Thorpe, *supra*, at 3060; 1 Coke, *supra*, at 45. Versions of this provision later became part of the Pennsylvania Constitution. See Koch, *supra*, at 367-68, 389-90 n.365. Section 26 of the 1776 Pennsylvania Constitution provided in pertinent part: ". . . All courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay." 5 Thorpe, *supra*, at 3088.

As the West Virginia Supreme Court of Appeals has observed, many state constitutions similarly couple the command "all courts shall be open" with a clause conferring a right to remedy by due course of law and/or a clause guaranteeing administration of justice without sale, denial, or delay. *State ex rel. Herald Mail Co. v. Hamilton*, 267 S.E.2d 544, 548 (W.Va. 1980) (citing provisions from Pennsylvania, Kentucky, Ohio, Tennessee, and Vermont constitutions).

Placing emphasis on the history of the latter two clauses, some courts have concluded that the open courts clause only confers access rights to litigants but not to the public. Koch, *supra*, at 446

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(citing *State, Etc. v. Porter Superior Court*, 412 N.E.2d 748, 751 (Ind. 1980); *Katz v. Katz*, 514 A.2d 1374, 1379 (Pa. Super. Ct. 1986), *appeal denied*, 527 A.2d 542 (Pa. 1987)); *see also C. v. C.*, 320 A.2d 717, 728 (Del. 1974). However, many state courts agree that their open courts clauses provide the public with an independent right of access to court proceedings. *See Koch, supra*, at 446; *e.g., Phoenix Newspapers, Inc. v. Superior Court*, 418 P.2d 594, 596-97 (Ariz. 1966) (relying on Arizona Constitution free speech clause but also citing Arizona Constitution open courts clause); *KFGO Radio, Inc. v. Rothe*, 298 N.W.2d 505, 510-11 (N.D. 1980), *limited by Dickenson Newspapers, Inc. v. Jorgensen*, 338 N.W.2d 72, 75-76 (N.D. 1983); *State ex rel. The Repository v. Unger*, 504 N.E.2d 37, 39-41 (Ohio 1986); *E. W. Scripps Company v. Fulton*, 125 N.E.2d 896, 899-903 (Ohio Ct. App.), *appeal dismissed*, 130 N.E.2d 701 (Ohio 1955), *but see In re T.R.*, 556 N.E.2d 439, 446-48 (Ohio) (holding Ohio Constitution open courts provision provides no greater protection than First Amendment of federal constitution), *cert. denied*, 498 U.S. 958, 112 L. Ed. 2d 396 (1990); *Oregonian Publishing Co. v. O'Leary*, 736 P.2d 173, 174-78 (Or. 1987); *Federated Publications, Inc. v. Kurtz*, 615 P.2d 440, 445 (Wash. 1980); *Cohen v. Everett City Council*, 535 P.2d 801, 802-04 (Wash. 1975); *Herald Mail*, 267 S.E.2d at 544, 548-49, 551-52 (W.Va. 1980); *see also State v. Copp*, 15 N.H. 212, 215 (1844) (stating "the right to have the courts open is the right of the public and not of the individual"). On this point, the West Virginia Supreme Court of Appeals stated:

The uniform interpretation of the mandate that the courts "shall be open" by those state courts called upon to construe the provision in their constitutions is that this language confers an independent right on the public to attend civil and criminal trials, and not simply a right in favor of the litigants to demand a public proceeding.

Herald Mail, 267 S.E.2d at 548.

The United States Constitution does not contain an open courts provision. However, the United States Supreme Court has held the First Amendment creates a presumptive right of the public to attend certain criminal proceedings. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 6-13, 92 L. Ed. 2d 1, 9-13 (1986) (*Press-Enterprise II*); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505-10, 78 L. Ed. 2d 629, 635-38 (1984) (*Press-Enterprise I*); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-07, 73 L. Ed. 2d 248, 255-57

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(1982); *Richmond Newspapers, Inc.*, 448 U.S. at 580-81, 65 L. Ed. 2d at 991-93 (plurality opinion). In *Press-Enterprise II*, the U.S. Supreme Court applied the twin tests of experience and logic in determining whether a First Amendment right of access attached to a California criminal preliminary hearing. See *Press-Enterprise II*, 478 U.S. at 8-13, 92 L. Ed. 2d at 9-13. The experience test requires evaluation of "whether the place and process have historically been open to the press and general public." *Id.* at 8, 92 L. Ed. 2d at 10. The logic test requires consideration of "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

Although the United States Supreme Court has not rendered a decision on whether the public has a presumptive right to attend civil proceedings, the Supreme Court has noted that civil trials historically have been presumptively open to the public. *Gannett Co.*, 443 U.S. at 386 n.15, 61 L. Ed. 2d at 625 n.15; see also *Richmond Newspapers, Inc.*, 448 U.S. at 580 n.17, 65 L. Ed. 2d at 992 n.17 (plurality opinion). Several federal circuit courts have held that certain civil proceedings are presumptively open under the First Amendment. See *Stone v. University of Md. Medical System Corp.*, 855 F.2d 178, 180-81 (4th Cir. 1988); *Publicker Industries Inc. v. Cohen*, 733 F.2d 1059, 1070-71 (3rd Cir. 1984); *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308-16 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1178-81 (6th Cir. 1983), cert. denied, 465 U.S. 1100, 80 L. Ed. 2d 127 (1984); *Newman v. Graddick*, 696 F.2d 796, 800-01 (11th Cir. 1983). Although these courts stress the strength of the First Amendment presumption of access, they have refused to define this right of access as absolute. See *id.* "Where the First Amendment guarantees access . . . access may be denied only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest." *Stone*, 855 F.2d at 180 (applying First Amendment access standard articulated for criminal trials in *Press-Enterprise I*, 464 U.S. at 510, 78 L. Ed. 2d at 638, to a district court order sealing the court record of a civil rights action brought by a medical school professor).

Our appellate courts have not considered whether Article I, § 18 of our North Carolina Constitution gives the public a constitutional right of access to medical peer review committee records and materials considered by a trial court in a civil action or the right to be present in the courtroom during presentation and discussion of this material. This Court has held a statute which closed civil commit-

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ment proceedings to the public was not unconstitutional under the First Amendment. *In re Belk*, 107 N.C. App. 448, 453, 420 S.E.2d 682, 685, *appeal dismissed and disc. review denied*, 333 N.C. 168, 424 S.E.2d 905 (1992). In declining to extend to civil commitment proceedings the First Amendment rights of access to criminal proceedings, our Court based its reasoning in part on the distinction that, prior to 1973, the civil commitment process, unlike traditional civil trials, did not require formal judicial hearings. *Id.* at 452, 420 S.E.2d at 684. Thus, the *Belk* Court did not decide in light of the historical tradition of open civil trials, whether the First Amendment creates a presumption of open civil trial proceedings. In *Belk*, this Court also held Article 1, § 18 does not create a constitutional right of the press and public to attend civil commitment proceedings. *See Belk*, 107 N.C. App. at 453, 420 S.E.2d at 685.

Prior decisions by the North Carolina Supreme Court contain statements that Article I, § 18 provides the public open access to our courts. *See State v. Burney*, 302 N.C. 529, 537, 276 S.E.2d 693, 698 (1981); *In re Nowell*, 293 N.C. 235, 249, 237 S.E.2d 246, 255 (1977); *In re Edens*, 290 N.C. 299, 306, 226 S.E.2d 5, 9-10 (1976); *Raper v. Berrier*, 246 N.C. 193, 195, 97 S.E.2d 782, 784 (1957). In *Raper*, our Supreme Court stated:

[T]he tradition of our courts is that their hearings shall be open. The Constitution of North Carolina so provides, Article I, Section 35 [now Section 18]. The public, and especially the parties are entitled to see and hear what goes on in the courts. . . . That courts are open is one of the sources of their greatest strength.

Raper, 246 N.C. at 195, 97 S.E.2d at 784. We note that *Raper* was decided prior to the adoption of the 1971 Constitution which kept intact the 1868 open courts provision (changing some punctuation marks, rephrasing one word and adding "shall be" to the final clause). Compare N.C. Const. art. I, § 18 with N.C. Const. art. I, § 35 (1868). "Constitutional conventions that readopt provisions in earlier constitutions without change are presumed to have confirmed and acquiesced in the prior judicial interpretations of the provision." Koch, *supra*, at 347 (citing *Warner v. State*, 81 Tenn. 52, 67-68 (1884) and *State v. Schlier*, 50 Tenn. (3 Heisk.) 281, 283 (1871)). Since *Raper* emphasized the public's right to see and hear what goes on in court, we presume the drafters, General Assembly members, and voters who approved the 1971 Constitution confirmed and acquiesced in our

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Supreme Court's interpretation of our open courts provision in *Raper*.

However, in applying Article I, § 18, our Supreme Court has recognized limitations on the public's right to be present in court. In *Burney*, the Court held Article I, § 18 was not violated when, during the testimony of a seven-year-old child rape victim, a trial court excluded all persons except the defendant and his family and attorney, defense witnesses, the district attorney, the state's witnesses, officers of the court, the jury, and members of the child's family. See *Burney*, 302 N.C. at 533-38, 276 S.E.2d at 696-98. Similarly, in *Raper*, although holding a petitioner's rights were violated when a judge conferred with petitioner's daughter in private in a custody hearing, the Court observed that a judge could confer privately with a child in this manner with the consent of the parties. *Raper*, 246 N.C. at 195, 97 S.E.2d at 783-84.

[5] Based on this history, the language of the constitutional text, our appellate courts' consideration of this provision, and other state courts' interpretation of similar provisions, we hold that the open courts provision of our state constitution provides the public, including Knight, a constitutional right of access to the civil court proceedings at issue here, including the videotapes, tapes, and transcripts of these proceedings, and to those portions of the court records sealed by the trial court in the orders on appeal.

We must therefore give initial definition to this right of access. Our state constitution open courts provision has three distinct clauses containing separate but related protections. See N.C. Const. art. I, § 18; *Cf. E. W. Scripps Co.*, 125 N.E.2d at 905 (Hurd, J. concurring) (discussing separate nature of clauses in identical open courts provision in Ohio Constitution). The open courts provision employs the word "shall" in the pronouncement that "[a]ll courts shall be open." N.C. Const. art. I, § 18 (emphasis added). "As used in statutes, contracts, or the like [the word "shall"] is generally imperative or mandatory." Black's Law Dictionary 1375 (6th ed. 1990); see also *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979) (applying this definition to statutes). The framers' use of the imperative word "shall" places constitutional limits on a court's discretion in exercising control of its proceedings and creates a strong presumption that court proceedings be open to the litigants and to the public. Of course, as with the federal guarantee, we hold that this presumption is not absolute as our Supreme Court has made clear in its previous

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consideration of this provision. There are some circumstances when a court may close proceedings and seal court records. However, the occasion for closing presumptively open proceedings and sealing court records should be exceedingly rare.

[6] In deciding whether to close court proceedings or seal court records, a court must balance the competing interests and policies at stake in light of the particular circumstances of the case but must give substantial weight to the presumption of open access. A court must keep in mind the nature of the protection provided by the open courts provision, including protection of the court's own integrity as an institution. This integrity is always at stake whenever court proceedings and records are closed to the public. Only when justice is administered openly in public view can the public be sure the courts are functioning impartially and independently of other influences.

A court should also keep in mind the relationship the open courts clause has to the interests protected in the other clauses of Article I, § 18, the right to remedy by due course of law and the right to have justice administered without favor, denial, or delay. Read in connection with these clauses, the open courts clause provides significant court access rights to litigants. There may be other public policies and competing interests at stake in a given case. After evaluating the competing policies and interests, a court should then determine whether any of these are so compelling that they overwhelmingly outweigh the strong presumption that court proceedings and records should be open to the public. Furthermore, if a court determines that closure of proceedings or sealing of records is needed, the closure or sealing order should be exceedingly narrow in scope so as to remove only those materials from public purview as is necessary to preserve the protected competing policies or interests.

[7] It is our task to apply these principles to the present case. We acknowledge the public policy interest in the confidentiality of medical peer review committee records and materials even when presented in the context of a civil action. However, this interest is counterbalanced by the public's interest in being fully informed regarding Dr. Virmani's challenge to defendant's assessment of his competency and suspension of his medical staff privileges. These interests are in tension with each other. However, when the strong presumption of open access to traditionally open court proceedings is added to the scales, the balance tips substantially towards retention of the open character of these proceedings.

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In addition, we observe that the peer review materials were introduced *by defendant* for the trial court's consideration regarding pre-trial motions in this action. In this context, public access to these court materials does not significantly impede defendant's rights of access to court. Defendant was not compelled to present the peer review materials for the trial court's review. It did so of its own volition. By injecting these peer review materials in the public forum of the superior court, defendant subjected the materials to public scrutiny. A party cannot obtain public vindication of its interests in the public forum of our courts without acceding to the public character of this process. We hold the trial court orders closing the court proceedings and sealing the court records in this action constitute reversible error.

Knight also contends the trial court orders violated its rights under the First Amendment of the United States Constitution. Since we have decided that Article I, § 18 of the North Carolina Constitution gives Knight a constitutional right of access at least equivalent to and possibly greater than any rights of access provided by the First Amendment, we need not address this argument.

RIGHT TO A HEARING

[8] Given the primary importance of the open courts presumption, we also address Knight's contention that the trial court violated its rights under our state constitution by *summarily* denying Knight's motions to intervene and to open the proceedings by rulings made in open court on 8 May 1996 and entered 10 May 1996. We hold the trial court was in error in denying Knight's motions without holding a hearing and without making findings of fact and conclusions of law.

In *Press-Enterprise II*, the U.S. Supreme Court held that, once a First Amendment right attaches, proceedings "cannot be closed unless specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enterprise II*, 478 U.S. at 13-14, 92 L. Ed. 2d at 13. In *Stone v. University of Md. Medical System Corp.*, the United States Court of Appeals for the Fourth Circuit addressed a fact situation similar to the case on appeal, albeit under First Amendment analysis. In *Stone*, a federal district court issued a one sentence order sealing nearly the entire record in a civil rights action without a hearing and without stating reasons for the order. *Stone*, 855 F.2d at 180. *The Baltimore Sun* filed a limited purpose

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motion to intervene with the Court of Appeals when the plaintiff appealed a summary judgment order. The Court of Appeals granted the motion to intervene and held the district court erred by summarily sealing the record without giving the *Sun* a reasonable opportunity to object to entry of the order and without stating reasons for the order supported by specific findings. *Id.* at 180-81.

Although *Stone* was a civil action, the Court relied on a previous decision, *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984), in which the Court held that a court in a criminal proceeding must give the public notice of a request to close a courtroom and to seal records and a reasonable opportunity to challenge the closure and sealing. *Knight*, 743 F.2d at 234-35. In *Knight*, the Court held notice must be given either by docketing the request reasonably in advance of disposition or by notifying persons present in the courtroom of the request and giving them opportunity to object and submit their views prior to closure. *Id.*

Since we have held the protection afforded by the North Carolina Constitution is at least as great as that afforded by the First Amendment, we hold *Knight* was entitled to the opportunity to be heard and to entry of an order containing adequate supportive findings like those stressed in the *Press-Enterprise* cases, *Stone*, and *Knight*. Thus, we hold the trial court was required, under Article I, § 18 of the North Carolina Constitution: (1) to furnish *Knight* a meaningful opportunity to be heard on its motion; and (2) to state reasons for its ruling supported by specific findings. Here, since Hechinger was present in the courtroom on 7 May 1996 when the trial court summarily closed the courtroom, he and *Knight* were entitled to a meaningful opportunity to challenge the closure. This opportunity was effectively denied by the trial court's summary disposition.

RIGHT TO INTERVENE

[9] Presbyterian contends, however, that *Knight's* motion to intervene was properly denied because *Knight* did not comply with the procedural requirements for intervention of right under N.C.R. Civ. P. 24(a) or permissive intervention under N.C.R. Civ. P. 24(b). Without deciding whether *Knight* is entitled to intervention of right under N.C.R. Civ. P. 24(a), we hold permissive intervention under N.C.R. Civ. P. 24(b) is one method available to *Knight* for the limited purpose of challenging the orders closing the proceedings and sealing the records in this action.

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With only minor exceptions, N.C.R. Civ. P. 24 and Rule 24 of the Federal Rules of Civil Procedure are substantially the same. *Ellis v. Ellis*, 38 N.C. App. 81, 84, 247 S.E.2d 274, 277 (1978). Given this similarity, the holdings of the federal circuit courts are instructive. Several federal circuit courts have held that Federal Rule 24(b) permissive intervention may be used by non-parties for the limited purpose of challenging protective or confidentiality orders entered in an action. *E.g.*, *Pansy v. Borough of Stroudsburg v. Ottaway Newspapers*, 23 F.3d 772, 778 (3rd Cir. 1994); *Beckman Industries Inc. v. International Ins. Co.*, 966 F.2d 470, 473-75 (9th Cir.), *cert. denied*, 506 U.S. 868, 121 L. Ed. 2d 140 (1992); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990), *cert. denied*, 498 U.S. 1073, 112 L. Ed. 2d 860 (1991); *Meyer Goldberg, Inc. of Lorain v. Fisher Foods*, 823 F.2d 159, 161-64 (6th Cir. 1987); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2nd Cir. 1979). Other federal circuit courts have held similarly without specifying whether such intervention is permissive or intervention of right. *E.g.*, *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896 (7th Cir. 1994); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783-87 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030, 102 L. Ed. 2d 970 (1989); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 788-89 (5th Cir. 1979).

Presbyterian contends Knight may not intervene under N.C.R. Civ. P. 24(b) because it has not asserted a claim or defense having a question of law or fact in common with the main action. We disagree. In addressing a similar assertion, the Third Circuit Court of Appeals held: "By virtue of the fact that the Newspapers challenge the validity of the Order of Confidentiality entered in the main action, they meet the requirement of Fed.R.Civ.P. 24(b)(2) that their claim must have 'a question of law or fact in common' with the main action." *Pansy*, 23 F.3d at 778. Here, Knight challenges the validity of orders closing court and sealing the medical peer review materials in the main action in response to Presbyterian's motions. For a limited purpose intervention such as this one, this nexus between Knight's contentions and the motions to close court and to seal records in the main action satisfies the N.C.R. Civ. P. 24(b) requirement of a common question of law or fact.

All of the orders before us on appeal are hereby reversed. This matter is remanded with direction that the trial court unseal all documents previously sealed pursuant to the orders hereby reversed. As part of further proceedings in the trial court regarding unsealing of

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these materials, the trial court may in its discretion order that names and identifying characteristics of non-witness patients be redacted and that confidentiality of communications between physicians and non-witness patients be protected as permitted by law, including consideration of N.C. Gen. Stat. § 131E-97 and N.C. Gen. Stat. § 8-53.

Reversed and remanded.

Judges EAGLES and SMITH concur.

RHONDA BUCHANAN GORDON AND JAMES WILLIAMS GORDON, PLAINTIFFS-
APPELLANTS v. DANNY FRED GARNER, G.S. MATERIALS, INC., AND
AGGREGATE CARRIERS, INC., DEFENDANTS-APPELLEES

No. COA96-1531

(Filed 18 November 1997)

1. Carriers § 1 (NCI4th)— dump truck accident—sand pit owner—no vicarious liability—not a common or contract carrier

Defendant G.S. Materials could not be held vicariously liable for the actions of defendant Garner under either North Carolina or federal dump truck statutes and regulations where plaintiff's vehicle was struck from the rear by a dump truck owned and operated by Garner, who was hauling sand from a sand pit owned and operated by G.S. Materials. G.S. Materials mines and sells sand to its customers; it has no dump trucks or other transportation vehicles, is incapable of transporting property for compensation, and is not a common carrier or a contract carrier.

2. Carriers § 17 (NCI4th)— dump truck accident—Chapt. 62—sand always exempt

Defendant Aggregate Carriers was not subject to liability under any of the statutes or regulations set forth in Chapter 62 of the General Statutes where plaintiff-Rhonda Gordon's vehicle was struck from the rear by a dump truck owned and operated by defendant Garner under hire to Aggregate Carriers to haul sand for defendant G.S. Materials. N.C.G.S. § 62-260(9) excludes from coverage of Chapter 62 persons engaged in "transportation in

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bulk of sand, gravel, dirt, debris, and other aggregates, or ready-mixed paving materials for use in street or highway construction or repair.” Sand is always exempted from Chapter 62 regardless of the purpose of such transportation; only ready-mixed paving materials must be used in street or highway construction or repair to qualify for the exemption.

3. Carriers § 31 (NCI4th)— dump truck accident—no federal liability—interstate transportation

Defendant Aggregate Carriers was not subject to liability for a traffic accident under federal statutes regulating the commercial dump truck industry because the federal rules and regulations apply only to carriers transporting persons or property in interstate commerce and there is no evidence tending to show that the driver hired by Aggregate was engaged in the interstate transportation of sand at the time of the accident.

4. Automobiles and Other Vehicles § 445 (NCI4th)— dump truck collision—independent driver—sand pit operator—trucking company—no liability under respondeat superior

The trial court did not err by granting summary judgment for defendants G.S. Materials and Aggregate Carriers on the issue of their liability under *respondeat superior* for a collision between defendant Garner’s dump truck and plaintiffs’ vehicle where the record tends to show that Garner was engaged in an independent business and occupation of hauling materials for contractors like G.S. Materials; Garner held a commercial driver’s license and had the independent use of his special skill and training in the execution of his work; he was not subject to discharge if he adopted one method of doing his work rather than another; and G.S. Materials and Aggregate Carriers exercised no direct control over the particular daily activities of Garner when he hauled sand to G.S. Materials’ customers. Although plaintiffs argue that an employer-employee relationship existed because Garner regularly worked for G.S. Materials and Aggregate Carriers, hauled sand for no other employers from August until the accident occurred in November, and hired no assistants to help him haul G.S. Materials’ sand, the dispositive question is whether Garner had the right to take another job and if he had the right to choose who operated his dump truck, not whether any of those rights were actually exercised.

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5. Automobiles and Other Vehicles § 538 (NCI4th); Negligence § 97 (NCI4th)— dump truck collision—overloaded truck—liability of sand pit operator

The trial court properly granted summary judgment in favor of G.S. Materials, a sand pit operator, on the issue of whether it was independently negligent in a collision between a dump truck and plaintiffs' auto by allowing the truck driver, an independent contractor, to leave the company pits with an overloaded truck. Even if G.S. Materials had a duty to prevent the driver from leaving with a overloaded truck and breached that duty on that day, there was insufficient evidence to support a finding that the overloaded condition was the proximate cause of the accident. The sole evidence presented by plaintiffs was the testimony of a consulting engineer who did not testify to a degree of reasonable certainty that the driver would have been able to prevent the collision but for being overloaded. Moreover, he was not in possession of such facts as would have enabled him to express a reasonably accurate conclusion as to the cause of the accident and any opinion he expressed as to what "may" not have happened if the truck had not been overloaded lacked factual foundation and is insufficient to raise a genuine issue of material fact on the issue of proximate cause.

6. Negligence § 97 (NCI4th)— dump truck collision—overloaded truck—driver paid by ton—sand pit operator—no evidence of actual negligence

The trial court properly granted summary judgment for defendant G.S. Materials, a sand pit operator, in an action arising from a collision between a dump truck operated by an independent contractor and plaintiffs' vehicle on the claim that G.S. Materials is independently negligent for paying truckers by the ton rather than by a time period, so that truckers were encouraged to disobey highway safety rules and regulations. The law in North Carolina is that a plaintiff should not be allowed to get a particular issue to the jury in the absence of evidence, direct or circumstantial, that a defendant actually was negligent and there was no evidence here of that nature.

Appeal by plaintiffs from orders entered 12 July 1996 and 30 October 1996 by Judge Henry V. Barnette, Jr. Heard in the Court of Appeals 28 August 1997.

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Law Offices of Johnny S. Gaskins, by Lisa Campbell Rivers and Johnny S. Gaskins, for plaintiffs-appellants.

Yates, McLamb & Weyher, L.L.P., by Andrew A. Vanore, III and Travis K. Morton, for defendant-appellee G.S. Materials, Inc., and Patterson, Diltthey, Clay & Bryson, L.L.P., by Reid Russell and G. Lawrence Reeves, Jr., for defendant-appellee Aggregate Carriers, Inc.

WYNN, Judge.

Under North Carolina law, vicarious and independent acts of negligence may be a basis for third party liability. In this case, the plaintiff, whose vehicle was struck by a trucker, sought recovery from the companies that hired the trucker to transport sand from the sand pits to a customer. Because we determine that the companies are not vicariously liable under either State or Federal laws that regulate the commercial dump truck industry; and further, because we find that the trucker was an independent contractor, we affirm the trial court's grant of summary judgment in favor of the companies.

This personal injury action arises out of an automobile accident which occurred when Rhonda Buchanan Gordon's vehicle was struck from the rear by a dump truck owned and operated by Danny Fred Garner. On the day of the accident, Garner was hauling sand in his dump truck from a sand pit owned and operated by G.S. Materials, Inc. in Lobelia, North Carolina. As a part of its sand pit business, G.S. Materials mines, sells and then delivers sand to customers in North Carolina and Virginia for their use in making concrete. G.S. Materials, however, does not own or operate any dump trucks capable of hauling the sand from its pits to its customers. The only equipment which G.S. Materials owns are off-road vehicles used in the mining and loading of the sand. Consequently, in order to transport its sand, G.S. Materials utilizes dump trucks owned and operated by co-defendant, Aggregate Carriers, Inc.

As a result of this arrangement, customers wanting a delivery of sand from G.S. Materials must contact and place an order with Aggregate Carriers, who in turn assigns a dump truck to pick up the sand so that it may be hauled from G.S. Materials's Lobelia sand pit to the specified destination. For the most part, Aggregate Carriers trucks are used for these hauls; however, in the event that they are not available, Aggregate Carriers maintains a pool of inde-

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pendent dump truck drivers to deliver the sand for its G.S. Materials contracts.

In November 1994, G.S. Materials entered into a contract to sell and deliver sand to Certified Concrete Company in Pittsboro, North Carolina. Aggregate Carriers, however, did not have enough dump trucks at that time to haul all of the sand that G.S. Materials had contracted to deliver. As a result, Aggregate Carriers hired independent drivers including Garner, to haul the sand to Certified Concrete.

As the sole proprietor of "Danny Garner Trucking," Garner had hauled sand for G.S. Materials since August 1994. He started his business in 1990 and operated his truck under a commercial license he obtained after receiving specialized training and passing a test given by the North Carolina Department of Transportation.

G.S. Materials paid Garner a set amount for each ton of sand that he hauled—the rate paid per ton varied depending on how far he had to travel in order to deliver the sand.

When actually delivering G.S. Materials's sand, Garner had no discretion concerning what he was to do with the sand once his truck was loaded. He was required to haul the sand to the customer specified by G.S. Materials. Aggregate Carriers also retained the right to release Garner from his services if he did not perform his duties to their satisfaction. It was in Garner's discretion, however, to decide if and when he would carry a load of G.S. Materials's sand. He also decided how many loads of sand he would carry on any given day and when he would quit work.

On November 11, 1994, Garner decided to pick up his first load of sand from G.S. Materials's Lobelia pit so that he could deliver it to Certified Concrete in Pittsboro. After delivering this first load to Certified Concrete, Garner returned to G.S. Materials's pit to pick up a second load of sand. On this second trip, Garner's truck was loaded with 23.71 tons of sand, over two tons more than his truck was authorized to haul. Despite being overloaded, Garner left G.S. Materials's sand pit to deliver this second load to Certified Concrete; and, it was while traveling with this second load that he slammed into the rear of the vehicle driven by Rhonda Buchanan Gordon.

As a result of the accident, on April 10, 1995, Ms. Gordon and her husband James Williams Gordon filed personal injury and loss of con-

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sortium claims in the Wake County Superior Court. They alleged that Garner negligently drove his truck into Ms. Gordon's vehicle, causing her severe injury, and that in operating his truck Garner acted within the course and scope of his agency and employment with G.S. Materials and Aggregate Carriers. The Gordons further alleged that certain independent acts and omissions committed by both G.S. Materials and Aggregate Carriers joined and concurred with Garner's negligence to produce the collision between Garner's truck and Ms. Gordon's vehicle.

In response to these allegations, G.S. Materials and Aggregate Carriers moved for summary judgment on the issues of their derivative and independent negligence. The Gordons also moved for summary judgment on the issue of Garner's liability. The trial court granted each of these motions; and on October 28, 1996, the remaining damages claims against Garner were tried before the court. A final judgment was entered against Garner and thereafter, the Gordons filed this appeal of the earlier grant of summary judgment in favor of G.S. Materials and Aggregate Carriers.

I.

The Gordons first contend that G.S. Materials and Aggregate Carriers are vicariously liable for Garner's actions under: (A) various state and federal statutes, rules, and regulations governing the commercial dump truck industry; and (B) the doctrine of *respondeat superior*. We address each contention in turn.

A. Liability Under Commercial Dump Truck Industry Laws

The Gordons contend that G.S. Materials and Aggregate Carriers are liable for the negligence of Garner under Chapter 62 of the North Carolina General Statutes, which governs the North Carolina Utilities Commission, and certain comparable federal statutes regulating the commercial dump truck industry. Under Chapter 62, a trucking company which falls within the definition of a "public utility" may be held liable for the negligence of the independent truck driver it hires. The Gordons argue that G.S. Materials and Aggregate Carriers are "public utilities" as defined by N.C. Gen. Stat. § 62-3(23) which provides in pertinent part:

(a.) "Public Utility" means a person, . . . now or hereafter *owning or operating* in this state equipment or facilities for:

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- (4) Transporting . . . property by . . . *motor vehicles* . . . for the public for compensation, except *motor carriers* exempted in G.S. 62-260 . . .¹

Chapter 62 further defines “motor vehicle” as “any vehicle, machine, tractor, semi-trailer, or any combination thereof, which is propelled or drawn by mechanical power and used upon the highways within the State.”² Any person who then “holds itself out to the general public to engage in the transportation by motor vehicle in intrastate commerce or property . . . for compensation” is considered a “common carrier by motor vehicle.”³ In that same vein, “any person which, under an individual contract or agreement with another person . . . engages in transportation . . . by motor vehicle of . . . property in intrastate commerce for compensation” is considered a “contract carrier by motor vehicle.”⁴

For the reasons set forth below, we conclude that: (1) as to G.S. Materials, neither the definitions under Chapter 62 nor other comparable federal statutes operate to impose liability on it and (2) as to Aggregate Carriers, N.C. Gen. Stat. § 62-260 exempts it from liability and the specific federal statutes relied upon by the Gordons are inapplicable to a determination of its liability.

(1) *G.S. Materials*

[1] The record in this case reveals that G.S. Materials does not own or operate any trucks, other equipment, or facility capable of transporting sand or any other property to its customers. Therefore, based on the plain language of N.C. Gen. Stat. § 62-3(23)(a.)(4), G.S. Materials does not qualify as a “public utility.” Therefore, since G.S. Materials is not a public utility, Chapter 62 does not apply to it.

Moreover, even if G.S. Materials did operate its sand pit business as a “public utility,” G.S. Materials is still not subject to the regulations promulgated by the North Carolina Utilities Commission because G.S. Materials does not “transport persons or property by railway or motor vehicle . . . for compensation.” Thus, it is neither a common carrier (“any person which holds himself out to the general public to engage in transportation . . . of persons or property . . . for

1. N.C. Gen. Stat. § 62-3(23)(a.)(4) (1989) (emphasis added).

2. N.C. Gen. Stat. § 62-3(18).

3. N.C. Gen. Stat. § 62-3(7).

4. N.C. Gen. Stat. § 62-3(8).

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compensation”) or a contract carrier (engages in such transportation pursuant to a private contract or agreement). Here, G.S. Materials mines sand and then sells it to its customers. It has no dump trucks or other transportation vehicles and is therefore incapable of transporting property for compensation. As such, G.S. Materials is neither a common nor contract carrier subject to Chapter 62 regulations.

The Gordons also allege that G.S. Materials is vicariously liable for Garner’s negligence under various regulations promulgated by the North Carolina Utilities Commission, specifically regulations R2-6(a) and R2-37. Regulation R2-6(a) provides in pertinent part:

No carrier authorized to operate as a common carrier of property or a contract carrier of property shall use any vehicle of which such carrier is not the owner for the transportation of property for compensation, except under a bona fide written lease from the owner . . .

Like N.C.G.S. § 62-3(23)(a).(4), this regulation applies only to common or contract carriers. Because we conclude that G.S. Materials is neither a common nor contract carrier, it follows that this regulation cannot operate to impose liability on G.S. Materials. For this same reason, we conclude that Regulation R-37 is also inapplicable to a determination of G.S. Materials’ liability.

We have reviewed the Gordons’ arguments regarding G.S. Materials’ liability under various federal statutes and regulations, as well as under North Carolina case law involving the statutory regulation of the commercial trucking industry, and because we conclude that G.S. Materials is neither a common nor contract carrier, we further conclude that those regulations are equally inapplicable to a determination of G.S. Materials’ liability. Accordingly, we hold that as a matter of law, G.S. Materials cannot be held vicariously liable for the actions of Garner under either North Carolina or federal statutes and regulations.

(2) *Aggregate Carriers*

[2] The Gordons also assert that Aggregate Carriers is subject to Chapter 62 liability because it is both a “public utility” and a common or contract carrier by motor vehicle. However, Aggregate Carriers argues that even if it is considered a “public utility” and a commercial carrier for purposes of the statute, it still cannot be held liable under Chapter 62 because it is exempt from such liability under exemption (9) of N.C. Gen. Stat. § 62-260.

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N.C.G.S. § 62-260(9), which is referenced in N.C.G.S. § 62-3(23)(a)(4), excludes from coverage of Chapter 62 persons in vehicles engaged in:

Transportation in bulk of sand, gravel, dirt, debris, and other aggregates, or ready-mixed paving materials for use in street or highway construction or repair;

Aggregate Carriers argues that this particular exemption applies to it because it is engaged in the business of transporting sand in bulk. In response, the Gordons argue that this exemption only applies to the transportation in bulk of sand, if such sand is used in street or highway construction or repair. To the contrary, we find that a careful reading of this exemption, with particular emphasis on punctuation and the word “or,” makes it clear that the transportation of sand is always exempted from Chapter 62 regardless of the purpose of such transportation, and that it is only ready-mixing paving materials which must be used in street or highway construction or repair in order to qualify for the exemption. Accordingly, we conclude that Aggregate Carriers is not subject to liability under any of the statutes or regulations set forth in Chapter 62 of North Carolina’s General Statutes because of the exemption afforded it by N.C.G.S. § 62-260.

[3] Next, the Gordons contend that Aggregate Carriers is also subject to liability under certain federal statutes which regulate the commercial dump truck industry. The specific federal rules and regulations which the Gordons cite to were promulgated by the Federal Highway Administration and Department of Transportation, and, like Chapter 62 of the North Carolina’s General Statutes, they too apply to both common and contract motor vehicle carriers. They differ, however, from Chapter 62’s regulations of carriers in a very significant way—they only apply to carriers transporting persons or property in *inter-state* commerce.

In the instant case, there is no evidence tending to show that Garner, while driving from Lobelia to Pittsboro was engaged in the transportation of sand in interstate commerce at the time of the accident. Therefore, we hold that as a matter of law, Aggregate Carriers cannot be held vicariously liable for Garner’s actions under either North Carolina or federal statutory law.

B. Liability Under the Doctrine of *Respondeat Superior*

[4] Having found no merit in the Gordons’ argument that G.S. Materials and Aggregate Carriers are subject to liability under North

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Carolina and federal statutory law, we now consider whether there are any material facts in the record to support the Gordons' assertion that the trial court erred in granting summary judgment in favor of G.S. Materials and Aggregate Carriers on the issue of their alleged liability under the doctrine of *respondeat superior*.

Under the doctrine of *respondeat superior*, for one defendant to be held vicariously liable for the actions of another, an employer-employee relationship must exist between the two.⁵ The Gordons argue that such a relationship existed in this case. However, G.S. Materials and Aggregate Carriers argue that the doctrine of *respondeat superior* does not operate to impose liability on them because Garner was an independent contractor at the time of the accident.

Generally, one who employs an independent contractor is not liable for the independent contractor's negligence.⁶ Our courts have defined an independent contractor as "one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work."⁷

In *Hayes v. Elon College*,⁸ our Supreme Court concluded that the central issue in determining whether one is an independent contractor or an employee is whether the hiring party "retained the right of control or superintendence over the contractor or employee as to details."⁹ The court then went on to explain that there are generally eight factors to be considered, none of which are by themselves determinative, when deciding the degree of control exercised in a given situation. These factors include whether:

The person employed (a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work;

5. See *Thomas v. Poole*, 45 N.C. App. 260, 264, 262 S.E.2d 854, 856 (1986); *White v. Hardy*, 678 F.2d 485, 486 (4th Cir. 1982).

6. See *Cook v. Morrison*, 105 N.C. App. 509, 413 S.E.2d 922 (1992); *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 364 S.E.2d 433, *reh'g denied*, 322 N.C. 116, 367 S.E.2d 923 (1988).

7. *Youngblood*, 321 N.C. at 384, 364 S.E.2d at 437.

8. 224 N.C. 11, 29 S.E.2d 137 (1944)

9. *Id.* at 15, 29 S.E.2d at 140.

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(c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.¹⁰

Considering several of these factors under the facts of the instant case, we hold that Garner was an independent contractor at the time of the accident.

First, the record tends to show that Garner was engaged in an independent business and occupation. His business was the hauling of materials for contractors like G.S. Materials. At the time of the accident, Garner conducted his business as "Danny Garner Trucking Company," an enterprise he solely owned and operated since 1990. In addition, Garner advertised his business by having his name and phone number painted on his dump truck.

Second, the evidence shows that Garner, who held a commercial driver's license, had the independent use of his special skill and training in the execution of his work. In order to drive his dump truck, Garner obtained a commercial license from the North Carolina Department of Transportation; and before being licensed, Garner attended special commercial driving classes where he received instructions on operating dump trucks and tractor-trailers. Moreover, no one from G.S. Materials or Aggregate Carriers ever instructed Garner on the particulars of how to operate his dump truck when hauling sand. The only instructions Garner received from G.S. Materials regarding the hauling of their sand were general directions to the customer destination.

Further, the record reveals that Garner was not subject to discharge if he adopted one method of doing his work rather than another, and that he retained the power to set his own work hours. He was free to decide if he wanted to work for G.S. Materials or Aggregate Carriers, when and how long he wanted to work, when and how long his breaks or lunch hour would be and how many loads of sand he was going to haul on a given day. In short, G.S. Materials and Aggregate Carriers exercised no direct control over the particular daily activities of Garner when he hauled sand to G.S. Materials' customers.

10. *Id.* at 16, 29 S.E.2d at 140.

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Nonetheless, the Gordons argue that because Garner regularly performed work for G.S. Materials and Aggregate Carriers, an employer-employee relationship existed. They point out that from August 1994 until the time of the accident in November of 1994, Garner hauled sand for no other employers except Aggregate Carriers and G.S. Materials. The Gordons also point out that Garner hired no assistants to help him haul G.S. Materials' sand. These facts alone, however, are not determinative under *Hayes*.

In applying the *Hayes* factors to these facts, the dispositive question is whether Garner had the *right* to take another job if wanted, and if he had the *right* to choose who operated his dump truck, not whether any of those rights were actually exercised. Here, Garner, at all times in his dealings with G.S. Materials and Aggregate Carriers, maintained both the right to seek other employment if he chose to and the right to hire assistants if he found them necessary.

Under these circumstances, we conclude that the facts here are susceptible to only one conclusion—that at the time of the accident, Garner was an independent contractor hired by Aggregate Carriers to haul sand for G.S. Materials.¹¹ Accordingly, we hold that the trial court did not err in granting summary judgment in favor of G.S. Materials and Aggregate Carriers on the issue of their liability under the doctrine of *respondeat superior*.

II.

By their second assignment of error, the Gordons assert two theories under which G.S. Materials should be held liable for its own negligence: (A) G.S. Materials negligently allowed Garner to leave its sand pit with an overloaded dump truck and (B) G.S. Materials negligently employed a compensation method which encouraged truckers like Garner to haul sand while overloaded and to speed in order to complete more trips each day. We consider each of these theories in turn.

A. Negligently Allowing Overloaded Truck to Leave Sand Pit

[5] Negligence is generally defined as the failure to exercise a duty of a care for the safety of another.¹² In order to establish actionable neg-

11. See *Yelverton v. Lamn*, 94 N.C. App. 536, 538-39, 380 S.E.2d 621, 623 (1989) (holding that when evidence is susceptible of only one conclusion, the question of whether a working party is an independent contractor or employee is question of law for the court).

12. *Thomas v. Dixon*, 88 N.C. App. 337, 363 S.E.2d 209 (1988).

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ligence, a plaintiff must show that: (1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligence breach of such duty was the proximate cause of the injury.¹³ Proximate cause is generally defined as a foreseeable cause, without which the Gordons' injuries would not have occurred.¹⁴

Viewing the evidence in the light most favorable to the Gordons, as we must when reviewing the propriety of a trial court's grant of summary judgment, we conclude that even if G.S. Materials had a duty to prevent Garner from leaving its sand pit with an overloaded truck and that it breached that duty on the day of the accident, the Gordons still did not make out a valid claim of actionable negligence because there is insufficient evidence in the record to support a finding that the overloaded condition of Garner's truck was the proximate cause of the November 11 accident.

The sole evidence that the Gordons presented to show proximate cause is the testimony of a consulting engineer who performed an accident reconstruction analysis. He testified that it was more difficult to stop an overloaded truck than it was to stop one that was not overloaded. He also testified that Garner may have been able to prevent his dump truck from colliding with Ms. Gordon's vehicle had his truck not been overloaded and had he not been driving at an excessive speed, or, that he would have at least been able to slow down so that a collision, if one occurred, would have only been minor. The engineer, however, did not testify to a degree of reasonable certainty that Garner would have been able to prevent his truck from colliding with Ms. Gordon's vehicle but for the fact that it was overloaded. In fact, when specifically asked by defense counsel whether he believed that Garner's truck, if not overloaded but nevertheless speeding, would have still collided with Ms. Gordon's vehicle, the engineer stated that he believed it would have.

Moreover, our review of the engineer's deposition testimony reveals that in performing his reconstruction analysis, he did not run any test on the truck driven by Garner; he did not talk to Garner regarding the accident (all the information he obtained about the accident he gained from the accident report and the officer called to the scene); he did not make any calculations as to the extent to which

13. *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 232, 311 S.E.2d 559, 564 (1984).

14. *Bolkhir v. N.C. State University*, 321 N.C. 706, 365 S.E.2d 898 (1988).

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the extra two tons of sand contributed to Garner's inability to slow down his truck; and he did not calculate into his analysis the actual point at which Garner began to apply his breaks before colliding with Ms. Gordon's vehicle. Given these circumstances, and the fact that the engineer never testified to any degree of scientific certainty that the overloaded condition of Garner's truck was a cause without which the Gordons' injuries would not have occurred, we cannot consider his opinion as to the cause of the November 11 accident to be anything other than mere speculation and conjecture. As our Supreme Court explained in *Lockwood v. McCaskill*,¹⁵

[an] expert may express the opinion that a particular cause "could" or "might" have produced the result indicating that the result is capable of proceeding from the particular cause as a scientific fact, i.e., reasonable probability in the particular scientific field;

The Court further pointed out that, however:

[I]f it is not reasonably probable, as a scientific fact, that a particular effect is capable of production by a given cause, and the witness so indicates, the evidence is not sufficient to establish prima facie the causal relation.¹⁶

The engineer in this case was not in possession of such facts as would have enabled him to express a reasonably accurate conclusion as to the cause of the accident. Therefore, any opinion he did express as to what "may" not have happened if Garner's truck had not been overloaded lacked factual foundation and is therefore deemed insufficient to raise a genuine issue of material fact on the question of proximate cause.¹⁷ Accordingly, we hold that the trial court properly granted summary judgment in favor of G.S. Materials on the issue of whether it was independently negligent in allowing Garner to leave the company pits with an overloaded truck.

B. Negligent Method of Compensation

[6] Finally, we reach the Gordons' assertion that a jury should have been allowed to determine whether the compensation system which

15. 262 N.C. 663, 668-69, 138 S.E.2d 541, 545-46 (1964).

16. *Id.*

17. See *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 444, 186 S.E.2d 148, 202 (1972) ("[i]nasmuch as the burden of establishing negligence is on the plaintiff, evidence which raises only a conjecture of negligence may not properly be submitted to the jury").

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G.S. Materials had in effect contributed to the accident in question. The Gordons contend that G.S. Materials is independently negligent for paying Garner and other truckers in its employ by the ton for the sand that they hauled, as opposed to by the day, week or year that they worked. This method, they contend, encouraged Garner and other truckers to disobey highway safety rules and regulations for the sake of making more money. In asserting this contention, however, the Gordons brought forth no evidence tending to show that G.S. Materials was somehow negligent in paying its truckers by this method of compensation. The law in this State is that a plaintiff should not be allowed to get a particular issue to the jury in the absence of evidence, direct or circumstantial, that a defendant *actually* was negligent.¹⁸ There being no evidence here of that nature, the issue of whether G.S. Materials' method of compensating its truckers was in fact the cause of the Gordons' injuries must be left in the realm of speculation and conjecture.

CONCLUSION

We hold that the trial court properly granted summary judgment in favor of G.S. Materials and Aggregate Carriers on all of the Gordons' claims against them. Accordingly, the order below is,

Affirmed.

Judges GREENE and MARTIN, Mark D., concur.

RODNEY ALTON LORBACHER, PLAINTIFF V. HOUSING AUTHORITY OF THE CITY OF RALEIGH, FLOYD T. CARTER, FORMER EXECUTIVE DIRECTOR, PAUL H. MESSENGER, CURRENT EXECUTIVE DIRECTOR AND HORACE C. BRANTLEY III, FORMER DEPUTY EXECUTIVE DIRECTOR, DEFENDANTS

No. COA97-129

(Filed 18 November 1997)

**1. Constitutional Law § 86 (NCI4th)— 42 U.S.C. § 1983—
action against individuals—presumed in official capacity**

It was presumed that plaintiff was suing the named defendants under 42 U.S.C. § 1983 in their official capacity as officers of the Housing Authority where the complaint did not identify

18. *Id.* (Emphasis in original).

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whether defendants were being sued in their individual or official capacities but the caption of the complaint and the allegations made therein refer to them by both their names and job titles. A suit against a defendant in his or her official capacity is simply another way of pleading an action against the municipality itself.

2. Constitutional Law § 86 (NCI4th)— employment termination—42 U.S.C. § 1983—violation of free speech— no policy or practice

Summary judgment was properly granted for defendant Housing Authority on a claim under 42 U.S.C. § 1983 for deprivation of free speech arising from plaintiff's firing as Director of Development where plaintiff neither alleged nor brought forth any evidence that the Housing Authority has a policy or practice of discharging employees for the exercise of First Amendment rights. Although plaintiff alleges that the individual defendants were delegated final policy-making authority, the Housing Authority Board established personnel policies and adopted the employee handbook in question, which states that all personnel decisions regarding demotions and discharges are vested in the Executive Director and those designated to act on the Executive Director's behalf. The Executive Director is a final decision-maker in matters of promotions and discharges, but is not the final policy-maker with regard to substantive personnel matters.

3. Trial § 43 (NCI4th)— summary judgment—motion to reconsider—new evidence

The trial court did not abuse its discretion by denying plaintiff's motion to reconsider a summary judgment for defendant Housing Authority on a 42 U.S.C. § 1983 claim in light of new evidence where the additional evidence failed to establish that the Housing Authority itself was responsible for the violation of plaintiff's constitutional rights.

4. Labor and Employment § 68 (NCI4th)— wrongful discharge—municipal agency—42 U.S.C. § 1983 claim distinguished

Defendant Housing Authority could be sued for wrongful discharge where plaintiff brought a state claim for wrongful discharge and a claim under 42 U.S.C. § 1983 against the Housing Authority and individual officials arising from his dismissal from the Housing Authority. A state claim for wrongful discharge may

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be based on the agency relationship between an entity and its officers and employees and plaintiff alleged that the individual defendants were acting in the scope and course of their employment when they discharged him. The court properly dismissed the claim against the individuals as they were not plaintiff's employers for purposes of a wrongful discharge claim and, while the Housing Authority contends that the state wrongful discharge claim against it should be dismissed for the same reasons as the § 1983 claim, the requirements for municipal liability under § 1983 are specifically driven by the text and legislative history of the federal statute.

5. Labor and Employment § 77 (NCI4th)— agency negligence disclosed—wrongful discharge claim—summary judgment

Summary judgment should not have been granted for defendant Housing Authority on a state wrongful discharge claim where plaintiff alleged that he was dismissed for giving truthful testimony and media statements about the Housing Authority's knowledge of dangerous conditions and inadequate maintenance programs which led to two deaths and defendant contended that plaintiff was discharged for failure to obtain a valid driver's license and for accepting rides from contractors in violation of policy. A valid claim for wrongful discharge exists when an at-will employee is discharged for an unlawful reason or in contravention of public policy and if plaintiff's discharge was in retaliation for his testimony, his claim falls well within the public policy exception. Plaintiff's evidence created a genuine issue of material fact as to the motive for his discharge; although defendant produced refuting evidence, it is for the finder of fact to determine the motive. However, the trial court correctly granted summary judgment on the issue of punitive damages since punitive damages may not be recovered from a municipal corporation absent statutory authorization.

6. Constitutional Law § 105 (NCI4th)— employment dismissal—federal due process—employee handbook—no entitlement to continued employment

The trial court properly dismissed under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's Fourteenth Amendment Due Process claim arising from his dismissal from the Housing Authority where plaintiff did not allege a liberty interest, failed to allege that he is covered by a statute or ordinance creating an entitlement to continued employment, and employee handbooks are not

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considered part of the employment contract unless expressly included.

7. Constitutional Law § 105 (NCI4th)— employment termination—North Carolina Constitution—insufficient property interest

The trial court properly dismissed plaintiff's claim that his discharge from the Housing Authority violated the Law of the Land clause of the North Carolina Constitution where he lacked the requisite property interest in continued employment to trigger the protections afforded by the State Constitution.

8. Constitutional Law § 98 (NCI4th)— freedom of speech—state constitution—wrongful discharge claim—adequate protection

Plaintiff's discharge from the Housing Authority, allegedly for giving deposition testimony and media statements regarding improper Housing Authority practices, did not warrant a direct claim under the North Carolina Constitution for violation of freedom of speech because plaintiff's rights are adequately protected by a wrongful discharge claim.

9. Intentional Mental Distress § 2 (NCI4th)— employment discharge—allegations—insufficient

The trial court did not err by dismissing plaintiff's claim for intentional infliction of emotional distress arising from his discharge from the Housing Authority, allegedly for disclosing the Housing Authority's negligent operations, where defendant's conduct, even assuming the truth of the allegations, did not rise to the required level of extreme and outrageous conduct and plaintiff did not allege that defendants' conduct was intentional.

10. Negligence § 75 (NCI4th)— employment discharge—negligent infliction of mental distress—allegations—insufficient

The trial court properly dismissed plaintiff's negligent infliction of emotional distress claim arising from his discharge from the Housing Authority, allegedly for disclosing the Housing Authority's negligent operations. The conclusion that defendant's conduct was not extreme and outrageous with respect to plaintiff's intentional infliction of emotional distress claim also precludes any claim for negligent infliction of emotional distress.

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Appeal by plaintiff from judgment entered 12 November 1996, by Judge Henry V. Barnette in Wake County Superior Court. Heard in the Court of Appeals 6 October 1997.

The purpose of the Housing Authority is to provide and maintain low income residential housing in the Raleigh area. Plaintiff worked for the Housing Authority for a number of years and eventually became "Director of Development." Part of plaintiff's responsibilities revolved around obtaining federal grant monies for improvements, supervising various employees, monitoring the work of consultants, and visiting construction sites to monitor for construction compliance.

On 29 June 1992, plaintiff lost his driver's license as a result of a driving while impaired conviction. Because performance of his duties required a valid driver's license, Brantley terminated plaintiff's employment on 21 July 1992. Plaintiff appealed his termination and agreed to find a car and driver for any necessary travel and was reinstated effective 8 August 1992.

As a result of negligent maintenance of a heating system, two residents of Walnut Terrace Apartments died from carbon monoxide poisoning on 10 October 1992. On 3 November 1992, a wrongful death action was filed against the Housing Authority. Plaintiff gave deposition testimony in the case on 22 October 1993 and testified regarding the Housing Authority's knowledge of the dangerous conditions at the apartment complex and failure to take any remedial action. Plaintiff was discharged by Paul Messenger on 28 October 1993.

In October 1994, plaintiff filed suit against the Housing Authority of the City of Raleigh, Floyd T. Carter, former Executive Director, Horace C. Brantley III, former Deputy Executive Director, and Paul H. Messenger, then current Executive Director. He alleged that his discharge resulted from his comments to the media about improper Housing Authority practices and his deposition testimony to the same effect.

Defendants claim plaintiff's discharge was not related to his deposition testimony but rather was the result of plaintiff's failure to obtain acceptable transportation arrangements that were necessary for the proper performance of his duties. Paul Messenger was hired as the new Executive Director of the Housing Authority, replacing Floyd Carter, on 20 September 1993. Shortly after his arrival, Messenger learned through a routine insurance check that plaintiff

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did not have a valid license. Messenger also learned that plaintiff was accepting rides to construction sites from the contractors he was supervising, in contravention of Housing Authority policy. Messenger terminated plaintiff's employment on 28 October 1993 on the grounds that plaintiff could not fulfill the responsibilities of his job without a license and that accepting rides from the contractors he was to supervise created an unacceptable conflict of interest.

Plaintiff brought the following claims against defendants: (1) a 42 U.S.C. § 1983 claim for violation of his First Amendment rights, (2) violation of his Fourteenth Amendment Due Process rights, (3) a conspiracy claim under 42 U.S.C. § 1985, (4) violations of his state constitutional rights under the Law of the Land and Free Speech Clauses, and (5) state law claims against defendants for breach of their fiduciary duties, intentional infliction of emotional distress and negligent infliction of emotional distress. Plaintiff additionally requested punitive damages.

Defendants moved to dismiss all claims except the federal constitutional free speech claim and the wrongful discharge claim against the Housing Authority. On 1 May 1996, Judge Barnette partially granted defendants' motion. All claims against defendant Brantley were dismissed for the lack of any allegation of misconduct on his part. All the remaining claims covered were dismissed as well, except for plaintiff's claims against defendants Carter and Messenger for punitive damages. Subsequently, defendants' motion for summary judgment on plaintiff's free speech, wrongful discharge and punitive damages claims was granted on 2 October 1996. On the same day, plaintiff tendered additional evidence and filed a motion to reconsider or for relief from summary judgment. The trial court denied this motion and plaintiff appealed.

William E. Moore, Jr. and Marvin Schiller for plaintiff appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Raymond M. Davis, for defendant appellee.

ARNOLD, Chief Judge.

Plaintiff appeals from the trial court's order granting defendants' motion for summary judgment on plaintiff's 42 U.S.C. § 1983 claim for violation of his First Amendment rights, his state wrongful discharge claim, and claims for punitive damages against defendants Carter and Messenger. He also assigns error to the trial court's denial of his

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motion to reconsider or for relief from summary judgment. Finally, plaintiff appeals from the partial grant of defendants' motion to dismiss on his Fourteenth Amendment Due Process claim, state constitutional Law of the Land and Freedom of Speech claims, and intentional and negligent infliction of emotional distress claims.

Summary judgment is appropriate when then there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 656, 267 S.E.2d 584, 586 (1980). It is not the court's function to decide questions of fact when ruling on a motion for summary judgment; rather, the moving party must establish that there is an absence of a triable issue of fact. *Moore v. Bryson*, 11 N.C. App. 260, 262, 181 S.E.2d 113, 114 (1971) (citations omitted). All evidence must be considered in the light most favorable to the non-moving party. *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. 347, 350, 363 S.E.2d 215, 217, *disc. review denied*, 322 N.C. 111, 367 S.E.2d 910 (1988) (citations omitted).

[1] Plaintiff alleges that defendants deprived him of his First Amendment right to free speech in violation of 42 U.S.C. § 1983. The federal statute reads, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994). The Housing Authority is a municipal corporation. *Jackson v. Housing Authority of High Point*, 316 N.C. 259, 341 S.E.2d 523 (1986). Although the language of § 1983 speaks in terms of "person," the United States Supreme Court holds that municipalities are "persons" for purposes of the statute. *Monell v. Department of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611 (1978).

Although plaintiff also brought claims against Housing Authority officers under the statute, we need only consider the liability of the Housing Authority for the § 1983 claim. Municipal officers may be sued under § 1983 in their official or individual capacity. *Hafer v. Melo*, 502 U.S. 21, 116 L. Ed. 2d 301 (1991). A suit against a defendant

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in his/her official capacity is simply another way of pleading an action against the municipality itself. *Monell*, 436 U.S. 658, 690 n.55, 56 L. Ed. 2d 611, 635 n.55. Officials who are sued in their individual capacity are personally liable for damages, although a defense of qualified immunity may be available to them. *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396 (1982).

In the present case, the complaint does not identify whether defendants Carter and Messenger are being sued in their individual or official capacities; however, the caption of the complaint, and the allegations made therein, refer to them by both their names and job titles. We presume that plaintiff is suing these individuals in their official capacity as officers of the Housing Authority. *See Kolar v. County of Sangamon of State of Ill.*, 756 F.2d 564, 568 (7th Cir. 1985). Therefore, we need only consider the liability of the Housing Authority with respect to this claim.

[2] Although a municipality may be sued under the statute, it may not be held liable solely on the basis of *respondeat superior*; rather, liability exists only if the entity itself is responsible for the violation. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478, 89 L. Ed. 2d 452, 462 (1986). The Housing Authority only can be held liable for the actions of its employees if it officially ordered or sanctioned the conduct, the employees responsible for plaintiff's demotion and discharge had final policy-making authority, or the action was taken pursuant to a municipal policy, practice or custom. *Id.* at 483 n.12, 89 L. Ed. 2d at 465 n.12.

Plaintiff neither alleges nor brings forth any evidence of the Housing Authority having a policy or practice of discharging employees for the exercise of First Amendment rights. Instead, plaintiff alleges that defendants Carter and Messenger were delegated final policy-making authority. It is on this theory of municipal liability alone which plaintiff rests his case. In order that the action properly may be considered a municipal policy, the employee must possess authority to establish "final policy with respect to the subject matter in question." *Id.* at 483, 89 L. Ed. 2d at 465. The determination of whether a specific official has final policy-making authority is governed by state or local law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 125, 99 L. Ed. 2d 107, 119 (1988).

The Housing Authority handbook states that all personnel decisions regarding demotions and discharges are vested in the Executive Director and those designated to act on his/her behalf. The fact that

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an official has some discretion in the exercise of his/her functions, in and of itself, does not give rise to municipal liability. *Pembaur*, 475 U.S. at 481-82, 89 L. Ed. 2d at 464. Although the executive director is a final decision-maker in matters of promotions and discharges, he is not the final policy-maker with regard to substantive personnel matters. The Housing Authority Board established personnel policies and adopted the employee handbook in question. Federal courts draw a line between the power to implement policy and the power to make policy. An official's ability to discharge an employee does not necessarily equate to the ability to create substantive policy. See *Greensboro Professional Firefighters Ass'n, Local 3157 v. City of Greensboro*, 64 F.3d 962, 966 (4th Cir. 1995) ("The discretion to hire and fire does not necessarily include responsibility for establishing related policy."). Plaintiff has failed to come forward with any evidence to support a viable theory of liability. Indeed, plaintiff failed to even address this element of a § 1983 claim in his brief. Accordingly, we conclude that summary judgment for defendant Housing Authority was properly granted.

[3] At this point, we also consider plaintiff's argument that in light of the introduction of new evidence, the trial court erred in denying his motion to reconsider or for relief from judgment. The standard of review on appeal from the trial court's denial of such a motion is whether the trial court abused its discretion. *Muse v. Charter Hospital of Winston-Salem, Inc.*, 117 N.C. App. 468, 481, 452 S.E.2d 589, affirmed *per curiam*, 342 N.C. 403, 464 S.E.2d 44 (1995). We conclude that the trial court did not abuse its discretion in this matter. The additional evidence failed to establish that the Housing Authority itself was responsible for the violation of plaintiff's constitutional rights.

[4] Plaintiff also brought a state law cause of action against defendants for wrongful discharge. The trial court properly dismissed the claim against the individual defendants as they were not plaintiff's employers for the purposes of a wrongful discharge claim. See *Sides v. Duke University*, 74 N.C. App. 331, 343, 328 S.E.2d 818, 827, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985). With regard to the Housing Authority, it argues that this claim against it fails for the same reasons that plaintiff's First Amendment claim fails. We disagree. Plaintiff brought suit against defendant Housing Authority for violation of his First Amendment rights pursuant to 42 U.S.C. § 1983. The requirements for municipal liability under § 1983 are specifically driven by the text and legislative history of this federal statute.

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Plaintiff's wrongful discharge claim is not a federal, but a state cause of action. The requirement of a policy, practice or custom leading to municipal liability is therefore inapplicable in this area.

While *respondeat superior* is not a proper basis for liability under a § 1983 claim, a state law claim for wrongful discharge may be based on the agency relationship between an entity and its officers or employees. *See id.* (recognizing an enforceable claim against the defendant when plaintiff alleged that the individuals who discharged her were acting as agents of the defendant). In his complaint, plaintiff alleges that the individual defendants were acting in the course and scope of their employment with the Housing Authority when they discharged him.

[5] Having decided that the Housing Authority can be sued for wrongful discharge, we turn now to the merits of the claim itself. As a general rule in North Carolina, an employee-at-will has no claim for wrongful discharge. *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 260, 335 S.E.2d 79, 84 (1985), *disc. review denied*, 315 N.C. 597, 341 S.E.2d 39 (1986). Either party may terminate the employment relationship for any reason, or for no reason at all. *Privette v. University of North Carolina*, 96 N.C. App. 124, 134, 385 S.E.2d 185, 190 (1989) (citations omitted). There are limits, however, to the employer's ability to discharge an at-will employee. A valid claim for wrongful discharge exists when an at-will employee is discharged for an unlawful reason or in contravention of public policy. *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989).

Assuming, as we must, that plaintiff's allegations are true, we first consider whether firing an employee for giving deposition testimony violates the public policy of this state. A discharge violates public policy if it tends to injure the public or is against the public good. *Id.* Plaintiff alleges he was discharged for giving truthful testimony regarding the Housing Authority's knowledge of dangerous conditions at the Walnut Terrace Apartments and inadequate maintenance programs which led to the death of two residents of the complex on 10 October 1992. If plaintiff's discharge was in retaliation for such testimony, then plaintiff's claim against the Housing Authority falls well within the public policy exception to at-will employment. This Court has often held that truthful testimony is necessary for the proper administration of justice and for the protection of the public good. *See, e.g., Williams v. Hillhaven Corp.*, 91 N.C. App. 35, 370

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S.E.2d 423 (1988) (employee harassed and discharged after truthful testimony); *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985) (employee discharged after giving truthful deposition testimony).

The Housing Authority contends that plaintiff was not fired for his comments to the media and deposition testimony; rather, it argues that plaintiff's discharge resulted from his failure to obtain a valid driver's license and his acceptance of rides from contractors in violation of Housing Authority policy. This may be true, and if the Housing Authority can show that plaintiff would have been discharged regardless of his testimony, then plaintiff cannot recover. Summary judgment, however, is an extreme remedy and rarely should be granted in matters of motive and credibility determinations. *Burrow v. Westinghouse Electric Corp.*, 88 N.C. App. 347, 351, 363 S.E.2d 215, 218, *disc. review denied*, 322 N.C. 111, 367 S.E.2d 910 (1988) (citations omitted).

Plaintiff gave deposition testimony on 22 and 25 October 1993. Shortly thereafter on 28 October 1993, defendant terminated plaintiff's employment. Furthermore, plaintiff produced evidence that he had been discharged and reinstated approximately one year earlier for lack of a driver's license. Although defendants produced evidence refuting plaintiff's claim of retaliatory discharge, plaintiff's evidence created a genuine issue of material fact as to the motive for his discharge. In this case, summary judgment is inappropriate, as it is for the finder of fact to determine the motive behind plaintiff's discharge. *Id.* However, we do uphold the trial court's order granting defendants' motion for summary judgment on the issue of punitive damages. Absent statutory authorization, punitive damages cannot be recovered from a municipal corporation. *Long v. City of Charlotte*, 306 N.C. 187, 206-208, 293 S.E.2d 101, 113-15 (1982).

[6] Our standard of review for a Rule 12(b)(6) motion to dismiss is whether, as a matter of law, the complaint, treating its allegations as true, is sufficient to state a claim upon which relief may be granted. *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). Plaintiff's complaint should be liberally construed and not dismissed "unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987).

Plaintiff alleges that his discharge violated the Due Process Clause of the Fourteenth Amendment. Cases involving due process

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claims require a two-step analysis. First, does plaintiff have a liberty or property interest entitling him to due process protection? *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548 (1972). Second, if such an interest exists, what process is due? *Matthews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18 (1976). Because plaintiff did not allege in his complaint that his liberty interests were violated, his sole claim for relief is based on a property interest in continued employment with the Housing Authority.

Although it protects property interests, the Constitution does not create such interests. Rather, property interests are created and defined by independent sources, such as state law. *Roth*, 408 U.S. at 577, 33 L. Ed. 2d at 561. Therefore, North Carolina law governs whether plaintiff has a property interest in continued employment. In this state, a legal presumption exists that all employees are at-will and have no continued entitlement to employment. *Still v. Lance*, 279 N.C. 254, 259, 182 S.E.2d 403, 406 (1971). An employee may be other than at-will if he has contracted for a definite period of time or if a statute or ordinance creates such a right. *Bishop v. Wood*, 426 U.S. 341, 344, 48 L. Ed. 2d 684, 690 (1976).

In his complaint, plaintiff alleges that he was a "regular or permanent" employee. Even when an employee is hired on a permanent basis, the relationship is still terminable at the will of either party. *Howell v. Credit Corp.*, 238 N.C. 442, 443-44, 78 S.E.2d 146, 147 (1953). Plaintiff fails to allege that he is covered by a statute or ordinance creating an entitlement to continued employment. Instead, plaintiff states that an employee handbook created such an entitlement by specifying only for-cause discharge. In *Johnson v. Mayo Yarns, Inc.*, 126 N.C. App. 292, 484 S.E.2d 840, *disc. review denied*, 346 N.C. 547, 488 S.E.2d 802 (1997), this Court affirmed a dismissal where the plaintiff failed to allege how such a handbook was made part of the employment contract. Employee handbooks are not considered part of the employment contract unless expressly included. *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 656, 412 S.E.2d 97, 99 (1991), *cert. denied*, 331 N.C. 119, 415 S.E.2d 200 (1992). Because plaintiff fails to allege a property interest protected by the Due Process Clause, the motion to dismiss with respect to this claim was properly granted.

[7] We turn our attention now to plaintiff's state constitutional claim. Plaintiff alleges his discharge violated the Law of the Land Clause of the North Carolina Constitution. N.C. Const. art. I, § 19. The North

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Carolina Law of the Land Clause is generally considered the equivalent of the Due Process Clause and has been interpreted as requiring that neither property nor liberty may be deprived but by the general law, "the law which hears before it condemns. . . ." *State v. Hedgebeth*, 228 N.C. 259, 266, 45 S.E.2d 563, 568 (1947), *cert. granted*, 333 U.S. 854, 92 L. Ed. 1134, and *cert. dismissed*, 334 U.S. 806, 92 L. Ed. 1739 (1948) (citations omitted). Although a decision of the United States Supreme Court construing the Due Process Clause is persuasive in interpreting a claim brought under the North Carolina Law of the Land Clause, it is not controlling. *Watch Co. v. Brand Distributors, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974). In this case, however, plaintiff's complaint fails to state a valid claim under the Law of the Land Clause for similar reasons. He simply lacks the requisite property interest in continued employment to trigger the protections afforded by our State Constitution. We hold, therefore, that the trial court properly dismissed plaintiff's complaint with respect to this claim.

[8] Plaintiff also alleges his discharge violates his freedom of speech secured by the North Carolina Constitution. Our Constitution guarantees that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained. . . ." N.C. Const. art. I, § 14. Our State Supreme Court views these words as a "direct personal guarantee" of the right of freedom of speech. *Corum v. University of North Carolina*, 330 N.C. 761, 781, 413 S.E.2d 276, 289, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992).

In *Corum*, the Court held that one whose state constitutional rights have been abridged has a direct claim under the appropriate constitutional provision. *Id.* at 782, 413 S.E.2d at 290. A claim is available, however, only in the absence of an adequate state remedy. *Id.* Because we determine that plaintiff's rights are adequately protected by a wrongful discharge claim against the Housing Authority, a direct constitutional claim is not warranted. *Barnett v. Karpinos*, 119 N.C. App. 719, 728, 460 S.E.2d 208, 213, *disc. review denied*, 342 N.C. 190, 463 S.E.2d 232 (1995).

[9] Plaintiff also assigns error to the dismissal of his intentional and negligent infliction of emotional distress claims, but we conclude that dismissal of these claims was also proper. In order to state a valid claim for intentional infliction of emotional distress, plaintiff must show that defendants engaged in extreme and outrageous conduct which was intended to cause severe emotional distress, or were recklessly indifferent to the likelihood that such distress would result,

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and severe distress did result from defendants' conduct. *Dickens v. Puryear*, 302 N.C. 437, 452-53, 276 S.E.2d 325, 335 (1981). A successful claim for negligent infliction of emotional distress exists if defendants negligently engaged in conduct that results in severe distress, if this result was reasonably foreseeable. *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990).

Regarding plaintiff's intentional infliction of emotional distress claim, plaintiff has failed to allege conduct by defendants that is "so outrageous in character, and so extreme in degree, as to go beyond all possible grounds of decency. . . ." *Briggs v. Rosenthal*, 73 N.C. App. 672, 677, 327 S.E.2d 308, 311, *cert. denied*, 314 N.C. 114, 332 S.E.2d 479 (1985). As an initial matter, the determination of whether the alleged conduct is extreme and outrageous is a question of law for the court. *Shillington v. K-Mart Corp.*, 102 N.C. App. 187, 198, 402 S.E.2d 155, 161 (1991) (citation omitted). Plaintiff alleges he was discharged to deflect responsibility for the deaths which occurred at Walnut Terrace Apartments and because he exercised his First Amendment rights and disclosed the Housing Authority's negligent operations. Even assuming the truth of plaintiff's allegations, defendants' conduct does not rise to the level of extreme and outrageous conduct as contemplated by existing case law. In *Trought v. Richardson* for instance, the plaintiff alleged her supervisors fired her for refusing to violate hospital operating procedures and spread false and malicious statements about the reasons for her discharge. 78 N.C. App. 758, 338 S.E.2d 617, *disc. review denied*, 316 N.C. 557, 344 S.E.2d 18 (1986). The Court held that as a matter of law the conduct did not "exceed all bounds usually tolerated by decent society." *Id.* at 763, 338 S.E.2d at 620.

Additionally, plaintiff fails to allege that defendants' conduct was intentional. Plaintiff's complaint merely states that defendants knew or should have known of his emotional and physical condition. In *Von Hagel v. Blue Cross and Blue Shield*, 91 N.C. App. 58, 370 S.E.2d 695 (1988), the Court held that the plaintiff's claim for intentional infliction of emotional distress was properly dismissed when the complaint only alleged that the defendant refused to pay on an insurance policy when it knew of the plaintiff's *vulnerable mental and physical condition*. The Court held the allegation was insufficient because it failed to demonstrate calculated conduct directed at the plaintiff. *Id.* at 64, 370 S.E.2d at 700. For these reasons, we conclude that the dismissal of plaintiff's intentional infliction of emotional distress claim was proper.

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[10] The trial court also properly dismissed plaintiff's negligent infliction of emotional distress claim. We are not aware of any case specifically holding that the level of conduct required for an intentional infliction of emotional distress claim is the same as that required for a negligence action. We find no principled distinction however for employing a higher or lower threshold for one over the other. Therefore, our conclusion that defendant's conduct was not extreme and outrageous with respect to plaintiff's intentional infliction of emotional distress claim also precludes any claim for negligent infliction of emotional distress.

In summary, plaintiff's claim for wrongful discharge against the Housing Authority is remanded for trial. The trial court's rulings are otherwise affirmed.

Affirmed in part and remanded in part.

Judges EAGLES and MARTIN, Mark D., concur.

STATE OF NORTH CAROLINA, PLAINTIFF V. KENYATTA APPLEWHITE, DEFENDANT

No. COA96-1433

(Filed 18 November 1997)

1. Robbery § 85 (NCI4th)— attempted armed robbery—sufficient evidence

There was sufficient evidence of the elements of intent to deprive another of personal property and an overt act calculated to carry out that intent to support defendant's conviction of attempted armed robbery where the evidence tended to show that defendant pointed a gun at the victim and ordered him to get down and empty his pockets, and that as the victim tried to comply, he was shot by another person and then by defendant.

2. Criminal Law § 876 (NCI4th Rev.)— instructions—deliberate and reach unanimous verdict—not plain error

The trial court's instruction to the jury before it retired to deliberate that the jurors "must talk it over, deliberate, and reach a unanimous verdict" did not coerce a verdict and was not plain error.

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3. Criminal Law § 898 (NCI4th Rev.)— instructions—reference to “God’s justice”—not plain error

The trial court did not commit plain error by its reference in the instructions to “God’s justice.”

4. Criminal Law § 1095 (NCI4th Rev.)— structured sentencing—aggravating factor—failure to assist wounded victim

The trial court did not err by finding as a statutory aggravating factor for attempted armed robbery and assault with a deadly weapon inflicting serious injury that defendant failed to assist the victim to save his life after the victim was shot and near death since (1) defendant’s abandonment of the victim was not an element of either offense, and (2) this factor is reasonably related to the purposes of sentencing.

5. Criminal Law § 1097 (NCI4th Rev.)— structured sentencing—mitigating factor—community support system—finding not required

The trial court did not err by failing to find the statutory mitigating factor that “defendant has a support system in the community” where the evidence showed only that defendant’s sister and a friend live in the same community as defendant. N.C.G.S. § 15A-1340.16(e)(18).

6. Criminal Law § 1457 (NCI4th Rev.)— restitution—failure to preserve issue for appeal

Defendant failed to preserve for appeal the issue of the trial court’s recommendation that defendant make restitution to certain entities for specified amounts as a condition of post-release supervision where the prosecutor tendered a list of medical expenses incurred by the victim after being shot by defendant; the trial court read the list aloud in open court; and defense counsel stated that he had no comment about the court’s recommendation for restitution and made no objection to the entry of the recommendation.

Appeal by defendant from judgments entered 31 July 1996 by Judge Paul M. Wright in Wayne County Superior Court. Heard in the Court of Appeals 27 August 1997.

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Attorney General Michael F. Easley, by Assistant Attorney General Sylvia Thibaut, for the State-appellee.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

LEWIS, Judge.

Defendant was indicted for attempted armed robbery and assault with a deadly weapon with intent to kill inflicting serious injury. He pled not guilty to both charges. A jury found defendant guilty of attempted armed robbery and of the lesser included offense of assault with a deadly weapon inflicting serious injury. We find no error.

On the night of 29 September 1995, Carl Darby was standing on a footpath running through the VIP Trailer Park in Goldsboro. Three men approached. Darby testified that one of these men was defendant, whom Darby had seen several times before at the trailer park and knew by the nickname "Yatt Yatt."

Darby testified that as he began to walk away, defendant pointed a gun at him and told him not to move. Another man grabbed Darby from behind and also pulled a gun on him. Defendant told Darby to get on the ground and empty his pockets. Before Darby could comply he was shot in the back and in the chest. At the time, defendant was the only person in front of Darby with a gun drawn. The gunshots knocked Darby to the ground and defendant and the others fled.

A passerby drove Darby to Wayne Memorial Hospital, where he was treated for internal bleeding and a collapsed lung. Darby told the responding officer his assailant's name was "Yatt Yatt" and described him. He also correctly provided the address of the defendant's sister Pam, whom Darby said lived in the same trailer park where the shooting occurred. Darby later picked out defendant's picture from a lineup.

Defendant's sister testified she was not outside when the shooting occurred, but that when she walked out the door of her trailer to see what had happened, defendant ran up with her son and told her to get back in the house because there was shooting. Defendant's friend Tracy Kornegay, who is the neighbor and best friend of defendant's sister, testified that when Darby was shot, defendant was standing in the yard of his sister's trailer.

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Upon defendant's conviction, the trial court determined that defendant's prior record level was Level 1, found aggravating and mitigating sentencing factors in each case, entered judgment and commitment, and imposed a 69-month minimum term of imprisonment in the attempted robbery case and a consecutive 31-month minimum term of imprisonment in the assault case.

[1] Defendant first argues that his motion to dismiss the attempted armed robbery charge should have been granted because there was insufficient evidence of two elements of the crime: (1) intent to deprive another of personal property, and (2) an overt act calculated to carry out that intent. *See State v. Allison*, 319 N.C. 92, 96, 352 S.E.2d 420, 423 (1987). We disagree.

A motion to dismiss for insufficient evidence should be denied if there is substantial evidence of each element of the crime. *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993). Substantial evidence is such relevant evidence as a reasonable mind might find sufficient to support a conclusion. *Id.*

The victim Darby testified that defendant pulled a gun from under his shirt, pointed it at Darby, and told him to "get down" and "empty [his] pockets." As Darby tried to comply he was shot twice—first by the male standing behind him, then by defendant. This evidence is substantial enough for a reasonable person to conclude that defendant intended to rob Darby, and that he committed overt acts to further that intent: pointing a gun at Darby and ordering him to get down and empty his pockets.

[2] Defendant's next two assignments of error pertain to the instructions given to the jury by the trial court. Before the jury retired to deliberate, the trial court instructed, *inter alia*:

It is your exclusive province. It's your job to find the true facts of this case and to render a verdict reflecting the truth as you find it.

... I instruct you that a verdict is not a verdict until all twelve of you agree unanimously as to what your decision shall be. You cannot render a verdict by some other means, such as a majority vote, flipping a coin, or anything like that. *You must talk it over, deliberate, and reach a unanimous verdict.*

(emphasis added). Defendant made no objection to this instruction during trial but now argues it was plain error because it coerced a unanimous verdict.

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A jury instruction is plainly erroneous if it can be fairly said that it probably impacted the jury's finding of guilty. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Our state's Supreme Court has stressed that an improper instruction will rarely justify reversing a criminal conviction when no objection was made in the trial court. *Id.* at 661, 300 S.E.2d at 318. After reviewing the entire record, we cannot say the judge's charge that the jurors "must talk it over, deliberate, and reach a unanimous verdict" was an error so grave that it probably impacted the jury's verdict.

Darby testified that defendant was the person who accosted him with a gun, ordered him to drop to the ground and empty his pockets, and shot him. When Darby was interviewed just after the shooting he identified his assailant by defendant's nickname and gave the address of his assailant's sister. The officer drove to this address and spoke with defendant's sister, who admitted she knew "Yatt Yatt." Darby's later, more detailed description of his assailant was read into evidence for the jury to compare with defendant.

After telling the jurors they "must . . . deliberate and reach a unanimous verdict," the judge asked counsel for the State and defendant if they had anything else to say, and neither did. During more than three hours of deliberations, the jury was twice called back into court and asked whether a verdict had been reached. The foreman responded "No" but indicated they were making progress. The judge sent the jury back without saying anything that might pressure the jury into reaching a verdict. To the contrary, the judge told the jurors, "There's no hurry." At no time did the foreman indicate the jury was having special problems in its deliberations. After the jury announced its unanimous verdicts of guilty, jurors were polled individually and all affirmed their acquiescence in the verdict. On this record, we find no plain error in the court's instruction that the jury "must . . . reach a unanimous verdict."

Defendant argues the instructions in this case are similar to those found to be grounds for reversal in *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987), and *State v. Parker*, 29 N.C. App. 413, 224 S.E.2d 280 (1976). These cases are distinguishable.

In *Smith*, the jury had been deliberating the sentence in a first degree murder case for over three hours when it inquired about the consequences of its failure to reach a unanimous verdict. 320 N.C. at 422, 358 S.E.2d at 339. The trial court replied by repeating that the jurors needed to confer together without violating individual judg-

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ments and that “the decision you reach must be unanimous.” *Id.* at 420, 358 S.E.2d at 338. The Supreme Court held that the instruction in response to the jury inquiry was plain error because it probably resulted in coerced unanimity. *Id.* at 422, 358 S.E.2d at 339. However, the Court stressed that its holding rested on the fact that the defective instruction was in response to an inquiry clearly indicating dissent among the jurors. “[I]n the context of the jury’s inquiry,” the Court emphasized, “the instructions were probably misleading and probably resulted in coerced unanimity.” *Id.*

In this case, the jury made no similar inquiry, and the trial court gave no instruction during jury deliberations that could be construed as coercing a unanimous verdict. That the jury took over three hours to weigh the evidence and reach a decision does not by itself indicate that unanimity was probably coerced by the charge the jury was given before retiring to deliberate.

Nor is *State v. Parker* controlling. The *Parker* Court held that the challenged instruction regarding a unanimous verdict was “sufficiently *prejudicial* to require a new trial” (emphasis added). 413 N.C. App. at 414, 224 S.E.2d at 281. In the instant case we review the judge’s instruction by the standard of plain error, not prejudicial error. We cannot say that the challenged instruction in this case *probably* impacted the jury’s finding of guilt.

[3] Defendant argues that another portion of the trial court’s charge to the jury was plain error, in that it violated the Establishment Clause. There was no objection when the trial court instructed the jury as follows:

Ladies and gentlemen of the jury, the highest aim of every trial that’s ever been conducted in our country is the ascertainment of truth. Where truth is, God’s justice steps in garbed in its robes and tips the scales.

It would have been better had the trial court not mentioned the Supreme Being in its charge to the jury. We note, however, that virtually every witness is administered an oath ending with the words, “so help you God,” and this is not held to taint such evidence as is thereafter adduced. In any event, the trial court’s use of the phrase “God’s justice” is hardly a sufficient basis for a finding of plain error, and we find none here.

[4] Defendant’s next assignments of error pertain to the trial court’s finding of the following nonstatutory aggravating factor in both

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cases: "After shooting the victim who was injured near the point of death, the defendant left the victim without rendering any assistance to save life."

Defendant argues that evidence necessary to prove the elements of his offenses was used to prove the above aggravating factor, in violation of N.C. Gen. Stat. § 15A-1340.16(d) (Cum. Supp. 1996). A similar aggravating factor was upheld in *State v. Reeb*, 331 N.C. 159, 415 S.E.2d 362 (1992), and we find *Reeb* to be controlling. As the Supreme Court noted, "[I]t was the leaving of the defendants which was the gravamen of the aggravating factor. This factor is not inherent in the crime [of assault with a deadly weapon with intent to kill inflicting serious injury]." *Id.* at 181, 415 S.E.2d at 374. In this case, defendant's abandoning his victim, who had been shot twice and was lying on the ground, was not an element of either offense of which he was convicted. Evidence used to prove this conduct by the defendant was not necessary to prove either of his offenses, and so defendant's argument must fail.

Defendant also contends that the above aggravating factor is not reasonably related to the purposes of sentencing, and therefore violates G.S. § 15A-1340.16(d)(20). The Supreme Court in *Reeb* found a similar aggravating factor to be reasonably related to the purposes of sentencing, where the defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury. *Reeb*, 331 N.C. at 182, 415 S.E.2d at 375. Once again we find *Reeb* controlling, and we find no error.

We have considered defendant's remaining assignment of error regarding the above aggravating factor and find it unpersuasive.

[5] Next, defendant argues that the trial court erred by failing to find the statutory mitigating factor that "defendant has a support system in the community." N.C. Gen. Stat. § 15A-1340.16(e)(18) (Cum. Supp. 1996). Defendant neither requested this factor nor objected to the trial court's failure to find it.

Defendant must prove the existence of a mitigating factor by a preponderance of the evidence, and the trial court must find a statutory mitigating factor only if the evidence supporting it is substantial, uncontradicted, and manifestly credible. *State v. Jones*, 309 N.C. 214, 219-20, 306 S.E.2d 451, 454-55 (1983).

At the sentencing hearing, defendant's mother and first cousin did announce their presence in support of defendant; however, both

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live in Virginia. The record discloses only two people in Goldsboro who could possibly function as a “support system” for defendant: his sister, Pam, and his friend, Tracy Kornegay. The fact that these two people live in the same community as defendant, standing alone, does not mandate a finding that defendant has a support system in the community. The trial court’s failure to find this factor in mitigation was without error.

[6] Finally, defendant argues that the trial court’s restitution recommendation must be vacated because it is not supported by the evidence.

At the sentencing hearing the prosecutor in open court requested the entry of an order for restitution in the amount of \$11,256.29, to cover the medical expenses of treating defendant’s victim. The prosecutor tendered to the court a list of the entities to whom money was owed, and the court read the contents of this list aloud:

THE COURT: Well, it looks like \$207 to Eastern Radiology, \$5,112.30 to Pitt Memorial Hospital, \$1,411 to East Care Helicopter, \$770 to East Carolina School of Medicine, \$3,457.99 to Wayne Memorial Hospital, and \$298 to Wayne County Radiology. It looks like a total here of \$11,256.29.

The court immediately asked counsel for defendant whether he had “anything to say” about these items, and counsel replied that he did not. The court proceeded to recommend that defendant make restitution to the same entities and in the same amounts listed above, as a condition of post release supervision. This restitution recommendation was entered on defendant’s judgment and commitment for assault with a deadly weapon inflicting serious injury. At no time prior to the trial court’s entry of the recommendation did defendant’s counsel object to it.

To preserve a question for appellate review, a party must present the trial court with a timely objection or motion, stating the specific grounds for the ruling the party desired the court to make. N.C.R. App. P. 10(b)(1). This Court may, in its discretion, waive the party’s failure to do so pursuant to Rule 2 of the Rules of Appellate Procedure.

The prosecutor’s request for restitution and the judge’s recitation of the contents of that request were both made in open court, in the presence of defendant’s counsel. It was announced precisely to whom restitution was to be paid and in precisely what amounts. The

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trial court specifically asked counsel for defendant if he had anything to say about the request for restitution, and he did not. Under these circumstances, defendant has failed to preserve the restitution issue for appeal, and we decline to address defendant's objection on the merits.

No error.

Judges JOHN and SMITH concur.

STATE OF NORTH CAROLINA v. DENNIS JOE CONNELL

No. COA96-1491

(Filed 18 November 1997)

**1. Crime Against Nature § 4 (NCI4th)— indecent liberties—
defendant allegedly asleep—intent inferred from act**

The trial court did not err by denying defendant's motions to dismiss a charge of taking indecent liberties with a child and defendant's motion to set aside the guilty verdict where the evidence, in the light most favorable to the State, was that defendant got into a bed which he shared with the victim's mother and went to sleep; he was later joined by the mother, who also went to sleep; the eight-year-old victim came to their bed at about midnight; defendant touched her inside her panties, "rubbed on her," and put his finger in her vagina; there was no testimony that defendant gave any indication other than the touching that he was awake; the victim admitted that she did not know whether he was awake; and the only testimony regarding intent was a social worker's testimony that the victim had told her that, when confronted by the victim's mother, defendant had said that he thought he was touching the mother. The State can infer from the touching and defendant's comment to the mother that he was awake and that his purpose was to gratify his sexual desires.

**2. Criminal Law § 798 (NCI4th Rev.)— indecent liberties—
defense of mistake—inference that instruction requested**

It can be inferred that a defendant charged with indecent liberties was requesting the mistake of fact instruction where the eight-year-old victim entered the bed where defendant and the

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child's mother were sleeping, told her mother the next day that defendant had touched her, a social worker testified that defendant later told the mother that he thought he was touching the mother, there was no evidence that defendant was awake, and the defendant at trial asked the judge to instruct the jury that if defendant "didn't mean to touch the child, he's not guilty."

3. Crime Against Nature § 13 (NCI4th)— indecent liberties— sleeping defendant—instruction on mistake—improperly denied

The trial court erred in an indecent liberties prosecution by not giving the requested mistake of fact instruction where the eight-year-old victim was touched by defendant after she joined defendant and her mother in her mother's bed after defendant and her mother were asleep. The only evidence is that defendant went to bed and went to sleep before the victim entered his room, and the only testimony regarding intent is the victim's statement to a social worker that, when confronted by the mother, defendant said that he thought he was touching the mother. Because the State presented only circumstantial evidence that defendant was awake and intended to touch the child instead of the mother, the court should have given the instruction.

4. Criminal Law § 785 (NCI4th Rev.)— indecent liberties— defendant allegedly asleep—instructions on diminished capacity and unconsciousness—not given—plain error

There was plain error in a prosecution for indecent liberties in the trial court's failure to instruct the jury on the defense of diminished capacity and unconsciousness where the eight-year-old victim got into bed with her mother and defendant after both were asleep and later stated that defendant had touched her improperly. There was no direct evidence that defendant was awake at the time of the alleged touching and the victim admitted that she did not know whether defendant was asleep or awake.

5. Evidence and Witnesses § 3170 (NCI4th)— indecent liberties—testimony of social worker—statement of child— child's testimony at trial—slight variances

The trial court did not err in a prosecution for indecent liberties by admitting the testimony of a social worker who was called to corroborate the victim's testimony. Although defendant contends that some of the testimony was not corroborative, the inconsistencies between the victim's testimony at trial and her

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statements to the social worker were only slight variations. The social worker's testimony strengthens and adds credibility to the victim's testimony.

Appeal by defendant from judgment entered 3 October 1996 by Judge Timothy L. Patti in Gaston County Superior Court. Heard in the Court of Appeals 9 September 1997.

This is a criminal case in which defendant was charged and convicted of taking indecent liberties with a child. He was sentenced to prison for a minimum term of 21 months and a maximum term of 26 months.

Evidence at trial showed that defendant was involved in a sexual relationship with the victim's mother. On the evening of 23 April 1995, the defendant and the victim's mother were spending the night at the mother's house. That night defendant went to bed alone, and the victim's mother later joined him in bed. The mother testified that as "far as she knew" the defendant had gone to sleep. Sometime around 12:00 a.m., the victim, an eight year old girl, had a bad dream and went to her mother's room and asked her mother's permission to get in bed with her and the defendant. She got in bed between defendant and her mother. The victim was wearing a nightgown and panties. The victim testified that when she got into bed she lay on her side facing the defendant. She testified that before she fell asleep, she felt the defendant's hand on her leg and pushed it away. Then, as she was falling asleep, she felt the defendant place his hand in her underwear and testified that he was "rubbing on me and stuff." The victim testified that she pushed the defendant's hand away again and switched places in bed with her mother. There was no testimony that the defendant awoke when the victim entered the room or that defendant was awake at anytime. In fact, the victim testified that she did not know whether the defendant was awake or asleep at the time of the incident.

The victim did not mention anything about the alleged incident to her mother the next morning but did tell her mother after school that day. The victim's mother immediately called Social Services. Social worker Dottie Scher interviewed the victim. Over the defendant's objection, Ms. Scher testified that the victim told her that at night on 23 April she got into bed with her mother and the defendant. She slept for about an hour when she woke up facing her mother's back. Ms. Scher testified over objection that the victim then told her that the

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defendant touched her “on the wrong spot” and went on to say the defendant put his finger in her vagina. Ms. Scher testified that the victim made no mention to her of switching places in bed with her mother. Ms. Scher testified that during the victim’s interview, the victim also told her that defendant, when confronted by her mother, told her mother that he thought he was touching the mother rather than the victim. Defendant moved to strike Ms. Scher’s “entire testimony” as not corroborative. The objection and motion to strike were denied. The defendant offered no evidence.

The jury convicted the defendant of taking indecent liberties with a minor, a violation of N.C.G.S. § 14-202.1.

Defendant appeals.

Attorney General Michael F. Easley, by Associate Attorney General Sondra C. Panico, for the State.

Marjorie S. Canaday and C. Frank Goldsmith, Jr., for defendant-appellant.

EAGLES, Judge.

[1] We first consider whether the trial judge erred in denying the defendant’s motion to dismiss and his motion to set aside the verdict. “Upon a motion to dismiss, ‘all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to every inference of fact which may be reasonably deduced therefrom.’ ” *State v. Jones*, 89 N.C. App. 584, 597, 367 S.E.2d 139, 147 (1988) (quoting *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E.2d 822, 826 (1977)). The decision to grant or deny a motion to set aside a verdict and for a new trial is within the sound discretion of the trial judge and will be reversed only upon an abuse of discretion. *State v. Serzan*, 119 N.C. App. 557, 561-62, 459 S.E.2d 297, 301 (1995), *cert. denied*, 343 N.C. 127, 468 S.E.2d 793 (1996).

A person is guilty of taking indecent liberties with a child under the age of sixteen if he either “willfully takes or attempts to take any immoral, improper, or indecent liberties . . . for the purpose of arousing or gratifying sexual desire,” or “willfully commits or attempts to commit any lewd or lascivious act upon or with the body part or any part or member of the body” of the child. N.C.G.S. § 14-202.1. Taking

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indecent liberties is a specific intent crime. *State v. Craven*, 312 N.C. 580, 584, 324 S.E.2d 599, 602 (1985). To prove a specific intent crime requires that the State establish that the defendant “acted willfully or with purpose in committing the offense.” *State v. Eastman*, 113 N.C. App. 347, 353, 438 S.E.2d 460, 463 (1994). The term “willfully” has been defined as an act being done “purposely and designedly in violation of the law.” *State v. Whittle*, 118 N.C. App. 130, 135, 454 S.E.2d 688, 691 (1995) (quoting *State v. Stephenson*, 218 N.C. 258, 264, 10 S.E.2d 819, 823 (1940)). However, in indecent liberties cases, a defendant’s purpose in committing the act is “seldom provable by direct evidence and must ordinarily be proven by inference.” *State v. Jones*, 89 N.C. App. 584, 598, 367 S.E.2d 139, 147 (1988) (quoting *State v. Campbell*, 51 N.C. App. 418, 421, 276 S.E.2d 726, 729 (1981)).

The State argues that from circumstantial proof that because the defendant committed the touching act against the victim, the jury can infer that the defendant had the requisite intent necessary to commit the crime. In other words, the State argues that from the evidence that defendant touched the victim, a jury could rationally conclude that the defendant woke up, realized the victim was in bed, and formed the intent to touch her “for the purpose of arousing or gratifying [his] sexual desire.” Based on *State v. Childress*, 321 N.C. 266, 232, 362 S.E.2d 263, 267 (1987), we agree.

The evidence, in the light most favorable to the State, shows that on the night in question, the defendant got into a bed that he and the victim’s mother shared and went to sleep. He was later joined by the victim’s mother who also went to sleep. The victim came to their bed at 12:00 a.m. Defendant touched the victim inside her panties, “rubbed on her,” and put his finger in her vagina. There was no testimony that during the alleged incident, the defendant ever said anything or gave any indication other than the touching that he was awake. Moreover, the victim admitted on cross-examination that she did not know whether the defendant was asleep or awake during the incident. The only testimony regarding the defendant’s intent was Ms. Scher’s testimony that victim told Ms. Scher that, when defendant was confronted by the victim’s mother, he stated that he thought he was touching the mother.

In response to questions at oral argument, the State conceded that the evidence of criminal intent was limited to the evidence that defendant had touched the victim in bed. The State argued vigorously that proof of the improper touching was sufficient to give rise to the inference that defendant was awake and did the touching with the

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intent to gratify his sexual desires. Our Supreme Court has disapproved the notion that in proof of criminal cases, an inference can not be based on an inference. Quoting from Wigmore, Evidence, the Court in *Childress* noted:

It was once suggested that an inference upon an inference will not be permitted, i.e., that a fact desired to be used circumstantially must itself be established by testimonial evidence, There is no such orthodox rule; nor can there be. If there were, hardly a single trial could be adequately prosecuted. (Citation omitted).

There is no logical reason why an inference which naturally arises from a fact proven by circumstantial evidence may not be made. This is the way people often reason in everyday life. In this case the inferences on inferences dealt with proving the facts constituting the elements of the crime. We hold that the jury could properly do this. Insofar as *Holland*, *Byrd*, *LeDuc* and other cases hold that in considering circumstantial evidence an inference may not be made from an inference, they are overruled.

State v. Childress, 321 N.C. 226, 232, 362 S.E.2d 263, 267 (1987) (quoting 1A Wigmore, *Evidence* § 41 (Tillers rev. 1983)). From the defendant's touching of the victim and his exculpatory comment to victim's mother, the State can infer that he was both awake and his purpose was to satisfy his sexual desires. Accordingly, the trial court did not err in denying the defendant's motion to dismiss.

[2] We next consider whether the trial court erred in failing to instruct on the mistake of fact defense. Defendant argues that defense counsel requested the mistake of fact instruction be given to the jury and that the trial court's denial of such an instruction violated the defendant's right to a fair trial. The defendant in fact asked the judge to instruct the jury that if defendant "didn't mean to touch the child, he's not guilty." In support of this instruction, Ms. Scher testified that the victim stated that when the defendant was confronted by the victim's mother, defendant stated he thought he was touching the mother. From this request and the evidence at trial, we can infer that the defendant was requesting the mistake of fact instruction. "[A] crime is not committed if the mind of the person doing the act is innocent." *State v. Welch*, 232 N.C. 77, 80, 59 S.E.2d 199, 202 (1950). If there is evidence from which an inference can be drawn that the defendant committed the act without the criminal intent necessary, then the law with respect to that intent should be explained and

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applied to the evidence by the court. *State v. Walker*, 35 N.C. App. 182, 186, 241 S.E.2d 89, 92 (1978).

[3] Here there was no evidence presented to suggest that the defendant was awake at the time of the alleged incident. In fact, the only evidence we have is that the defendant went to bed and went to sleep before the victim entered his room. Moreover, the only testimony regarding defendant's intent was victim's statement to Dottie Scher that when confronted by her mother, defendant stated that he thought he was touching the mother. Because the State presented only circumstantial evidence that defendant was awake and intended to touch the child instead of the mother, the trial court should have instructed the jury as to the mistake of fact defense. Accordingly, the trial court erred in failing to instruct the jury on the mistake of fact defense.

[4] We next consider whether the trial court committed plain error in failing to instruct the jury on the defense of diminished capacity and unconsciousness. Defendant did not request these instructions but argues that the judge's failure to instruct constitutes plain error. The defendant said there was evidence that supports the finding that the defendant was asleep and thus these instructions should have been given. Generally, the defendant must object to preserve errors relating to the instructions. However, in exceptional cases, where the claimed instructional error is fundamental, "or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982), absence of the required instruction, even when there is no objection, will justify reversal under the plain error rule. In order to show the existence of plain error in the trial court's charge, the defendant must establish that but for the erroneous charge the jury probably would have reached a different verdict. *Id.* at 661, 300 S.E.2d at 379.

[U]nder the law of this State, unconsciousness, or automatism, is a complete defense to a criminal charge, separate and apart from the defense of insanity; that it is an affirmative defense; and that the burden rests with the defendant to establish this defense, unless it arises out of the State's own evidence, to the satisfaction of the jury.

State v. Caddell, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975). Unconsciousness would be a complete defense because "[t]he

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absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.’ ” *State v. Jerret*, 309 N.C. 239, 264-65, 307 S.E.2d 339, 353 (1983) (quoting *State v. Mercer*, 275 N.C. 108, 116, 165 S.E.2d 328, 334 (1969)). The earlier cases in which the defendant’s request for an unconsciousness instruction should have been granted have involved defendants who acted as though they were conscious, but for various reasons contend they were in fact unconscious. The test for whether an instruction on diminished capacity is warranted is whether the evidence of defendant’s mental condition is sufficient to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant has the ability to form the necessary specific intent. *State v. Clark*, 324 N.C. 146, 163, 377 S.E.2d 54, 64 (1989).

Here, there is no direct evidence that the defendant was awake at the time of the alleged touching. Even the victim admitted she did not know whether the defendant was asleep or awake. Although our research discloses no case law as to whether being asleep is an appropriate circumstance that requires an unconsciousness or diminished capacity instruction, we conclude that on this record both instructions would be proper. Moreover, had the jury here been instructed that if they found that defendant was unconscious or, more specifically, asleep, they must find defendant not guilty, the outcome of the trial likely would have been different. Accordingly, the trial court erred in failing to instruct the jury on unconsciousness and diminished mental capacity.

[5] The last issue is whether the trial court erred in admitting the testimony of State’s witness, Dottie Scher. Ms. Scher was called by the prosecution to corroborate the victim’s testimony. “Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness.” *State v. Rogers*, 299 N.C. 597, 601, 264 S.E.2d 89, 92 (1980); see *State v. Case*, 253 N.C. 130, 116 S.E.2d 429 (1960), *cert. denied*, 365 U.S. 830, 5 L.Ed.2d 707 (1961). Where testimony which is offered to corroborate the testimony of another witness does so substantially, it is not rendered incompetent by the fact that there is a slight variation. *State v. Lester*, 294 N.C. 220, 230, 240 S.E.2d 391, 399 (1978). “It is not necessary in every case that evidence tend to prove the precise facts brought out in a witness’s testimony before that evidence may be deemed corroborative of such testimony and properly admissible.” *State v. Burns*, 307 N.C. 224, 231, 297 S.E.2d 384, 388 (1982).

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Defendant contends that some of Ms. Scher's testimony was not corroborative; yet the inconsistencies between the victim's testimony at trial and the statements made to Ms. Scher were only slight variations. For example, how the victim was lying in bed, when did the incident occur after the victim crawled into bed, and whether the victim switched places with her mother after the incident. These differences fall under the "slight variation" exception to the corroboration rule. The defendant's main concern, however, is with Ms. Scher's testimony that the victim told her that the defendant put his finger inside her vagina. The victim's testimony at trial was that defendant put his hands inside her panties and "rubbed her." Even though Ms. Scher's testimony is not specifically what the victim testified to, Ms. Scher's testimony does strengthen and add credibility to the victim's testimony. Accordingly, this assignment of error is overruled.

New trial.

Judges MARTIN, John C., and TIMMONS-GOODSON concur.

EVERHART & ASSOCIATES, INC. AND HETTIE TOLSON JOHNSON, PETITIONERS V.
DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES,
RESPONDENT AND ZELIG ROBINSON, INTERVENOR-RESPONDENT

No. COA96-1369

(Filed 18 November 1997)

Administrative Law and Procedure § 65 (NCI4th)—denial of coastal development permit—whether site peninsula or island—land use map—offer of proof

The superior court erred by finding that the Coastal Resources Commission heard new evidence in violation of N.C.G.S. § 150B-51(a) where petitioners applied to the Commission for a permit to develop land located on or near Ocracoke Island in Hyde County; the permit was denied by the Commission in part because the land was an island surrounded by water and marsh and construction was prohibited by the Hyde County Land Use Plan for "estuarine islands"; an administrative law judge based his determination that the land is a peninsula solely on the maps in the Land Use Plan, which show the land to be a peninsula but which contain a caveat that they are not sur-

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veyed maps and cannot be relied upon to determine exact lot locations; and the Commission determined that the ALJ had erred by excluding the offers of proof and that petitioners had failed to meet their burden of coming forward with evidence to refute the findings of the agency and that the permit denial should be affirmed. The evidence before the Commission, including that contained in the offers of proof, reveals a dispute with respect to whether the development site is located on a peninsula or island and there is evidence that a reasonable person might accept as adequate to support the decision that the site is an island and that the Developers failed in their burden of proof by relying solely on the Land Use Plan maps. The trial and appellate courts are therefore bound by those findings.

Judge MARTIN, Mark D., concurring in the result only.

Appeal by respondent, Department of Environment, Health and Natural Resources, and intervenor-respondent, Zelig Robinson, from order dated 16 July 1996 by Judge William C. Griffin, Jr., in Hyde County Superior Court. Heard in the Court of Appeals 21 August 1997.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C.R. Wheatly, III, for petitioners appellees.

Attorney General Michael F. Easley, by Assistant Attorney General Robin W. Smith, for respondent appellant.

Ward and Smith, P.A., by I. Clark Wright, Jr., for intervenor-respondent appellant.

GREENE, Judge.

The North Carolina Department of Environment, Health and Natural Resources (DEHNR) appeals from the superior court's reversal of the denial of Everhart & Associates, Inc. and Hettie Tolson Johnson's (Developers) petition to develop land in Hyde County.

Developers applied to DEHNR's Coastal Resources Commission (Commission) for a permit to develop land known as Tolson's Island, located in Hyde County. The permit was denied by the Commission's Division of Coastal Management (DCM), the agency to which the Commission has delegated permitting authority. In denying the permit request DCM found as facts: (1) "the development tract [is] an island surrounded by water and marsh"; (2) the development would

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require the installation of “three 1440 gallon septic tanks to serve the nine lots proposed”; and (3) “[a]pproximately half of the nine lots would likely require residences and/or amenities to be built over [federal Clean Water Act section] 404 wetlands.” DCM then concluded that the development was violative of the Hyde County Land Use Plan (Land Use Plan) in that: (1) construction is prohibited on “estuarine islands”; (2) septic tank systems exceeding 1,500 gallons are prohibited; and (3) construction is prohibited in section 404 wetlands.

Following receipt of DCM’s denial letter, Developers were granted a hearing before an Administrative Law Judge (ALJ). The ALJ granted Developers’ motion *in limine* to exclude all testimony concerning whether Tolson’s Island is an island or a peninsula, basing his determination of the question solely on the maps in the Land Use Plan. The maps show Tolson’s Island to be a peninsula, but contain the following caveat: “This is not a surveyed map. Lot lines, rights-of-way, shorelines, lakes, creeks, canals, etc., represent approximate locations based on 1987 Hyde County tax records. This map cannot be utilized to determine exact lot/parcel dimensions or locations.”

The ALJ included in the official record DCM’s offers of proof showing what witnesses would have testified to had the testimony been allowed. The offer of proof of John A. Crew, District Planner for DCM, stated:

[T]he maps contained in [the Land Use Plan] are of a large scale and generalized because they were adopted for planning and informational purposes; that the maps therefore cannot be relied upon for regulatory purposes; and that a site inspection is necessary to determine the conditions on a site before determining whether a permit should be granted or denied.

He further noted that the Land Use Plan maps “expressly include disclaimers that site investigations are necessary to determine the conditions on specific parcels of land proposed for development.” In his offer of proof, Terry E. Moore, a DCM district manager, stated:

The development site is a small hummock or island which is separated from the Ocracoke mainland by a regularly flooded area of coastal wetlands. . . . It is bordered by Southward Creek to the west, an unnamed creek to the east and the Pamlico Sound to the north. There is a wide, low marsh to the east of the development site that separates the site from the main body of Ocracoke. The

unnamed creek to the east separates the development site from a similar estuarine island which is part of the Cape Hatteras National Seashore.

Based only on the maps contained within the Land Use Plan itself, the ALJ found that the area in question was a peninsula, not an island, and therefore disagreed with DCM's denial on the ground that the request involved construction on estuarine islands. The ALJ further found that the permit request was not inconsistent with the septic tank regulations of Hyde County because the plan called for three 1,400 gallon septic tanks rather than a tank with a capacity of 1,500 gallons or more. However, the ALJ recommended upholding the permit denial on the ground that the proposed construction affected section 404 wetlands. The ALJ further recommended allowing Developers the opportunity to modify their proposal so that it would not affect section 404 wetlands.

The Commission determined, from the offers of proof made before the ALJ, that the ALJ erred in excluding the evidence tendered by DCM on the question of whether Tolson's Island is in fact an island or a peninsula. Considering the offers of proof and the other evidence in the record before the ALJ, the Commission concluded that Developers had "failed to meet their burden of coming forward with evidence to rebut the findings" of DCM, and therefore concluded that DCM's permit denial must be affirmed.

Developers sought judicial review. Developers' petition for judicial review contended: (1) that the Commission acted arbitrarily and capriciously in denying the permit; (2) that the Commission erred in concluding Developers had not met their burden of coming forward with evidence to rebut the findings in the permit denial letter; and (3) that the Commission erred in concluding that the development plan is "inconsistent with those provisions of the Hyde County Land Use Plan relating to construction on estuarine islands; development in wetlands; and the capacity of new septic systems."

The superior court found that the Commission erred in considering the offers of proof included in the record and further found that the decision of the Commission was arbitrary. On these two grounds, the superior court ordered the reversal of the order of the Commission.

The dispositive issues are whether the superior court erred in (1) finding that the Commission heard new evidence in violation of N.C.

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Gen. Stat. § 150B-51(a), and (II) concluding that the agency acted arbitrarily and capriciously.¹

I

A final agency decision in a contested case hearing must be based on the “official record prepared pursuant to G.S. 150B-37.” N.C.G.S. § 150B-36(b) (1995). The official record includes “offers of proof.” N.C.G.S. § 150B-37(a)(2) (1995); *see* N.C. R. Evid. 103(a)(2) (defining offer of proof). The agency is not permitted to hear “new evidence” and if it does so, the trial court on review is required to reverse or remand the agency decision. N.C.G.S. § 150B-51(a) (1995).

In this case the Commission did not hear new evidence but did consider the evidence contained in DCM’s offers of proof before the ALJ. In doing so the Commission acted pursuant to the statute and the trial court erred in reversing on this basis.

II

“Administrative agency decisions may be reversed as arbitrary or capricious if they are ‘patently in bad faith,’ or ‘whimsical’ in the sense that ‘they indicate a lack of fair and careful consideration’ or ‘fail to indicate “any course of reasoning and the exercise of judgment.” ’” *Act-Up Triangle v. Commission for Health Services*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997) (quoting *Comr. of Ins. v. Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573, *rehearing denied*, 301 N.C. 107, 273 S.E.2d 300, (1980)) (citations omitted).

In this case our review of the “whole record,” *Act-Up Triangle*, 345 N.C. at 706, 483 S.E.2d at 392 (applying whole record review to arbitrary and capricious determination), reveals substantial evidence to support the decision of the Commission’s denial of the Developers’ permit request. *Eury v. N.C. Employment Security Comm.*, 115 N.C. App. 590, 597, 446 S.E.2d 383, 387, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994) (whole record test requires determination of whether decision is supported by substantial evidence). “Substantial evidence” is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S.E.2d 285, 289 (1995), *aff’d*, 343 N.C. 119,

1. Developers raise other issues in their brief; however, because they did not take appeal or make any cross-assignments of error, these issues will not be addressed by this Court. N.C. R. App. P. 28(c); *see Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 353 (1990) (limiting appellate review to exceptions and assignments of error), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991).

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468 S.E.2d 57 (1996) (quoting *Pamlico Tar River Foundation v. Coastal Resources Comm.*, 103 N.C. App. 24, 28, 404 S.E.2d 167, 170 (1991)).

The evidence before the Commission, including that contained in the offers of proof, reveals a dispute with respect to whether the development site is located on a peninsula or an island. The Commission, in accepting the findings of DCM, found the site to be an island and found that Developers had failed in their burden of showing the site to be a peninsula. See *Britthaven, Inc. v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 549, *disc. review denied*, 341, N.C. 418, 461 S.E.2d 754 (1995) (petitioner has burden of showing that the agency substantially prejudiced petitioner's rights). There is evidence that a reasonable person "might accept as adequate to support" the decision that the site is an island and that Developers failed in their burden of proof by relying solely on the Land Use Plan maps. The trial court and this Court are therefore bound by those findings. Indeed a court reviewing an administrative agency decision may not "replace the [agency]'s judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E.2d 538, 541 (1977) (*quoted in Act-Up Triangle*, 345 N.C. at 707-08, 483 S.E.2d at 393). It follows therefore that the decision of the Commission is not arbitrary or capricious.

The order of the superior court is therefore reversed and the decision of the Commission is reinstated.²

Reversed and remanded.

Judge WYNN concurs.

Judge MARTIN, Mark D., concurs in the result only with separate opinion.

2. Because we reverse the order of the superior court and reinstate the decision of the Commission denying the permit application on the ground that the development site is an island, we need not address the question of whether the placement of the three proposed septic tanks is also violative of the Land Use Plan. We do note that the parties to this appeal do not dispute that a portion of the development site is included within section 404 wetlands and that this is another basis for supporting the denial of the permit as submitted.

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Judge MARTIN, Mark D., concurring in the result only.

This case arises out of the Coastal Resources Commission's interpretation of the 1992 Hyde County Land Use Plan (Hyde County Land Use Plan), a publicly available document providing notice to, and routinely relied on by, landowners, land planners, developers, and governmental agencies. It is undisputed the Hyde County Land Use Plan prohibits development of estuarine "islands" within one mile of Ocracoke Island. It is also undisputed the Hyde County Land Use Plan characterizes Petitioner's property as a "peninsula." The legend on the Hyde County Land Use Plan states that "lot lines, rights of way, shorelines, lakes, creeks, canals, etc." depicted represent approximate locations. The Coastal Resources Commission, based on this customary legend, inserted a "new" shoreline on the Hyde County Land Use Plan, transforming the "peninsula" into an "island."

During administrative review of the initial decision of the Division of Coastal Management, the Administrative Law Judge (ALJ) found that Petitioner's property was a "peninsula," not an "island." The Superior Court found that the Coastal Resources Commission "relies on the Land Use Plan when it serves it[s] purpose and ignores it when it does not" and concluded, as a matter of law, that "[t]he initial determination by the Division of Coastal Management that the Petitioner's plan was inconsistent with the Hyde County Land Use Plan and the subsequent affirmation of that finding by the Coastal Resources Commission ironically and unlawfully ignores the Land Use Plan."

This case raises grave concerns about whether petitioners, who proceeded in good faith based upon the characterization of their property on the Hyde County Land Use Plan, have been fairly treated by their government. Nonetheless, although a judicial body "might not have reached the same result as the [Commission]," *State v. Jackson*, 322 N.C. 251, 257, 368 S.E.2d 838, 841 (1988), *cert. denied*, 490 U.S. 1110, 109 S. Ct. 3165, 104 L. Ed. 2d 1027 (1989), I am constrained to concur in the result of the majority opinion due to the deferential standard of review applicable to review of administrative determinations, *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 (1980), *Eury v. N.C. Employment Security Comm.*, 115 N.C. App. 590, 446 S.E.2d 383, *disc. review denied*, 338 N.C. 309, 451 S.E.2d 635 (1994).

SEDMAN v. RIJDES

[127 N.C. App. 700 (1997)]

CHARLES B. SEDMAN AND WIFE, ELLEN S. SEDMAN, PLAINTIFF APPELLANTS V. JACOB RIJDES AND WIFE, WILHELMINA RIJDES, AND MULTIFLORA GREENHOUSES, INC., DEFENDANT APPELLEES

No. COA96-1444

(Filed 18 November 1997)

**Zoning § 1 (NCI4th)—greenhouses—exemption from zoning—
bona fide farm operation**

The trial court correctly granted partial summary judgment for defendants on the zoning issue in an action in which plaintiffs alleged that defendants' commercial use of their property to grow plants in greenhouses was a nuisance and in violation of the Orange County Zoning Ordinance. It is the stated policy of North Carolina to promote the use and sale of agricultural products and the General Assembly included an exception for bona fide farm purposes in the grant of zoning authority to counties. The production of ornamental and flowering plants was explicitly listed as an example of bona fide farm purposes in the amended N.C.G.S. § 153A-340 and, under *Baucom's Nursery Co. v. Mecklenburg Co.*, 62 N.C. App. 396, the growing and harvesting of agricultural products by a greenhouse did not preclude qualification for the exemption. The activities here, including the construction of a driveway, the use of the driveway by large trucks, the operation of fans and heating devices, and the selling of plants on the premises, fall within the bona fide farm purposes exemption.

Judge WALKER concurring.

Appeal by plaintiffs from order entered 4 June 1996, judgment entered 12 June 1996, and order entered 24 July 1996 by Judge F. Gordon Battle in Orange County Superior Court. Heard in the Court of Appeals 25 August 1997.

Michael B. Brough & Associates by Michael B. Brough for plaintiff appellants.

Coleman, Gledhill & Hargrave, P.A. by Douglas Hargrave for defendant appellees.

McGEE, Judge.

Plaintiffs Charles B. and Ellen S. Sedman appeal the entry of partial summary judgment on the issue of whether the activities of

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Multiflora Greenhouses, Inc. (Multiflora), owned and operated by Jacob and Wilhelmina Rijdes, are in violation of the Orange County Zoning Ordinance (ordinance).

Multiflora is located on a forty-one acre tract of land that is zoned agricultural-residential and is adjacent to the Sedmans' residential property. At the summary judgment hearing, the parties presented evidence tending to show that the plants and vegetables produced by Multiflora are grown in pots filled with imported soil and housed in four greenhouses, each covering almost an acre of the Rijdes' tract. The greenhouses have concrete floors, exhaust fans and internal climate control devices to regulate the buildings' temperatures. There is a large metal building, a loading dock and a paved driveway to facilitate transportation of the flowers, vegetables and other plants. Examples of the products produced by Multiflora include marigolds, petunias, begonias, tomatoes and peppers. Some products are also sold on the premises.

There is a history of conflict between the Sedmans and the Rijdeses regarding the Rijdeses' use of the Multiflora tract. The Rijdeses began construction on the greenhouse in the fall of 1983. Ten months later the Sedmans filed a petition with the Orange County Board of Adjustment (Board) appealing the County's issuance of a building permit to the Rijdeses. The Board determined that Multiflora was not in violation of the ordinance. This determination was not appealed by the Sedmans. In 1988 a complaint was made to the Board which alleged that the location of a gas tank on the property of Multiflora constituted a zoning violation. In a 3 March 1988 letter to Mr. Rijdes, the Orange County Planning Department wrote that the "alleged zoning violation concerning the propane gas tank . . . was presented at Development Review meetings" and "a determination was made that Multiflora Greenhouses in its current operation qualifies as a bona fide farm use and is therefore exempt from the County's zoning regulations." In 1994 the Rijdeses purchased an 11.6 acre tract of land located adjacent to the Sedmans' property. Mr. Sedman approached Mr. Rijdes to inquire as to his plans for developing this tract. Mr. Rijdes responded that he planned to expand the greenhouse operation by building on the land.

On 14 November 1994, the Sedmans filed a complaint in Superior Court alleging: (1) that the use of the Multiflora tract "constitutes a nuisance, and the proposed expansion of the commercial operation . . . will aggravate this nuisance," and (2) "[t]he commercial

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enterprise now being conducted on [the Rijdeses' property] is, and the proposed expansion of this business will be, in violation" of the ordinance. The Sedmans prayed for relief in the form of damages from the Rijdeses, and "an injunction requiring defendants to eliminate and remove from their property all structures, uses, and operations found to constitute a nuisance." The Sedmans did not seek a determination from the Orange County Board of Adjustment as to whether Multiflora's present activities were exempt from the ordinance, nor did they join the County as a party to this action.

Prior to trial, the trial court granted partial summary judgment "on the issue of the alleged violation of the Orange County Zoning Ordinance" in an order announced in open court on 4 June 1996. At trial, the court submitted to the jury the issue of whether Multiflora's operation constituted a private nuisance. The jury found that no private nuisance was created. Subsequently the Sedmans made a motion for a new trial which was denied 24 July 1996.

The Sedmans timely filed notice of appeal from: (1) the trial court's order entered in open court on 4 June 1996 granting partial summary judgment to the Rijdeses "on the issue of whether the Multiflora Greenhouse operation is a bona-fide farm under [N.C.G.S. § 153A-340]", (2) the judgment entered 12 June 1996 upon the jury verdict that defendants' greenhouse operation did not constitute a nuisance, and (3) the trial court's order entered 24 July 1996 denying plaintiffs' motion for a new trial under Rule 59. All of the assignments of error made by the Sedmans relate to the trial court's partial grant of summary judgment, as do all the arguments in their brief. Thus, their appeals from the judgment entered 12 June 1996 and the order entered 24 July 1996 are deemed abandoned. N.C.R. App. P. 28(a).

We do not address the Sedmans' argument that a violation of the ordinance would constitute a nuisance per se as it is not necessary to address this issue to dispose of this case in that we hold that the activities allegedly in violation of the ordinance are exempt from compliance with the ordinance.

The Sedmans first argue that the entry of partial summary judgment was improper because the trial court erred in determining that Multiflora did not violate the ordinance. We disagree. The starting point of our analysis requires the interpretation of N.C. Gen. Stat. § 153A-340 (1991) to determine whether Multiflora and its operations are subject to the Orange County Zoning Ordinance.

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[127 N.C. App. 700 (1997)]

It is the stated public policy of North Carolina to promote the use and sale of agricultural products. N.C. Gen. Stat. § 106-550 (1995). In order to attain the objective of promoting “the efficient production and utilization of the products of the soil as essential to the health and welfare of our people,” the General Assembly encourages the

“[d]evelopment of new and improved methods of production, marketing, distribution, processing and utilization of plant . . . commodities at all stages from the original producer through to the ultimate consumer . . . methods of conservation, development, and use of land . . . guidance in the design, development, and more efficient and satisfactory use of farm buildings . . . farm machinery . . . and . . . making fuller use of the natural, human and community resources in the various counties of this State to the end that the income and level of living of rural people be increased.

N.C. Gen. Stat. § 106-583 (1995).

Therefore, when the General Assembly granted authority to the counties to regulate and restrict the use of land by means of zoning ordinances in N.C. Gen. Stat. § 153A-340, including the power to regulate and restrict the “use of buildings, structures, and land for trade, industry, residence, or other purposes,” it carved out one important exception to the counties’ jurisdiction: the authority to regulate land being used for “[b]ona fide farm purposes.” Specifically, county zoning “regulations may not affect bona fide farms, but any use of farm property for nonfarm purposes is subject to the regulations.” N.C. Gen. Stat. § 153A-340. Although the statute does not define “bona fide farm,” it does define “[b]ona fide farm purposes” to “include the production and activities relating or incidental to the production of crops, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agricultural products having a domestic or foreign market.” *Id.*

In *Baucom’s Nursery Co. v. Mecklenburg Co.*, 62 N.C. App. 396, 399, 303 S.E.2d 236, 238 (1983), our Court stated that the use of “modern and efficient equipment and methods in growing, cultivating and harvesting agricultural products” by a greenhouse did not preclude the greenhouse from qualifying for the exemption from county zoning regulations under the pre-amended N.C. Gen. Stat. § 153A-340. Our Court, in *Baucom’s*, was required to interpret a Mecklenburg County ordinance’s definition of “bona fide farm” in that Mecklenburg County had been granted special authority, applicable only to that

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county, to define “bona fide farm” in its ordinance. *See* 1967 N.C. Sess. Laws ch. 611 (“The board of county commissioners, as part of any ordinance adopted pursuant to this Article, may define ‘bona fide farm’ and ‘farm purposes’ in such reasonable manner as it may deem wise”). However, the state policy of encouraging the agricultural production enunciated in *Baucom’s* is relevant to the outcome in this case which requires interpretation of the amended N.C. Gen. Stat. § 153A-340. In *Baucom’s*, our Court held that a 19.6 acre nursery and greenhouse that produced vegetables and flowering plants was exempt from complying with a Mecklenburg County ordinance notwithstanding the fact that the plants were grown “in pots on top of plastic ground cover,” as it is the “State’s declared public policy” to encourage this type of agricultural production. *Id.* at 401, 303 S.E.2d at 238-39. Although our Court in *Baucom’s* was interpreting the pre-amended version of N.C. Gen. Stat. § 153A-340 and the Mecklenburg County ordinance, the differences between the two statutes and the two ordinances do not require a different outcome in this case. Rather, the amended N.C. Gen. Stat. § 153A-340 governing this case is stronger evidence of the General Assembly’s intent to define “bona fide farm purposes” to include plant cultivation because the amended statute, unlike its predecessor, explicitly lists the “production of . . . ornamental and flowering plants” as examples of uses of land for “[b]ona fide farm purposes.”

Multiflora’s operations are similar to those in *Baucom’s*, as both involve the large-scale production and sale of “ornamental and flowering plants.” We hold that the activities in which Multiflora is engaged including the construction of a driveway, the use of the driveway by large trucks to export plants from the premises, the operation of thirty-seven fans emitting low frequency sound and the selling of plants on the premises, fall within the bona fide farm purposes exemption for the following reasons. The use of large trucks to transport farm products, and the creation of facilities such as driveways and loading docks for such trucks, are both activities so essential to large-scale agricultural production that their exclusion from the exemption would render it meaningless. Similarly, the use of fans and heating devices is “incidental” to the year-round raising of plants inside greenhouses. Finally, as our Court held in *Baucom’s*, the selling of the products raised on the premises is also an exempt activity. *Baucom’s* at 401, 303 S.E.2d at 239.

As the activities conducted by Multiflora are exempt from compliance with the ordinance under N.C.G.S. § 153A-340, we reject the

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[127 N.C. App. 705 (1997)]

Sedmans' third and fourth assignments of error pertaining to whether such activities comply with the ordinance. Thus the trial court's order granting partial summary judgment is affirmed.

Affirmed.

Chief Judge ARNOLD concurs.

Judge WALKER concurs with separate opinion.

Judge WALKER concurring.

Although I concur, I find it important to note that plaintiffs not only contend that defendants are not engaged in a "bona fide farm purpose" in accordance with N.C. Gen. Stat. § 153A-340, but also that defendants' operation violates the Orange County Zoning Ordinance ("ordinance").

Plaintiffs have unsuccessfully challenged defendants' operation as being in violation of the ordinance in the past, most recently in 1988. They now contend that Orange County erred in determining that defendants' operation "qualifies as a bona fide farm use and is therefore exempt from the County's zoning regulations." However, since Orange County is not a party to this action, this issue is not before us.

CHARLES EVERETTE SHARPE, JR., PLAINTIFF v. SYLVIA G. NOBLES, DEFENDANT

No. COA96-1366

(Filed 18 November 1997)

1. Divorce and Separation § 401 (NCI4th)— child support— failure to seek higher-paying job—not bad faith suppression of income

The trial court erred by finding that plaintiff father depressed his income in bad faith and by using the earning capacity rule in calculating his child support obligation where the father's position was abolished and he twice accepted lower-paying positions with the same employer without attempting to find a job that would pay him what he was previously earning.

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[127 N.C. App. 705 (1997)]

2. Divorce and Separation § 424 (NCI4th)— child support— investments for child's college education—failure to certify to mother—contempt

The trial court did not err by finding plaintiff father in willful civil contempt for violating a court order to invest \$50 per month for his child's college education and to provide the mother with a certification as to where the money was invested where the father was given ample time to comply with the court's order, and the father was able to give notice of this investment to his former attorney.

3. Appeal and Error § 364 (NCI4th)— violation of court order—contempt—failure to include order in record—issue not reviewed

The Court of Appeals will not consider plaintiff father's contention that the trial court erred by finding him in contempt for failing to comply with an order that he provide the mother an insurance card and claim forms for medical insurance he was required to provide for their child where the father failed to include the court's order in the record on appeal. N.C. R. App. P. 9(a)(1)(d).

Appeal by plaintiff from order entered 10 July 1996 by Judge Arnold O. Jones in Lenoir County District Court. Heard in the Court of Appeals 21 August 1997.

Paul T. Cleavenger for plaintiff-appellant.

Gerrans, Foster & Sargeant, P.A., by William W. Gerrans, for defendant-appellee.

WYNN, Judge.

When calculating the child support obligation owed by a parent, a showing of bad faith income depression by the parent is a mandatory prerequisite for imputing income to that parent. In this case, because we hold that the trial court's finding that the father did not look for a job that would pay him what he was earning in his previous position was insufficient to show bad faith income depression, we remand this matter to the trial court for redetermination of the father's child support obligation. However, we uphold the trial court's order of contempt against the father for failure to obey a previous order of the court because there was sufficient competent evidence of his willful failure to comply with the earlier order.

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[127 N.C. App. 705 (1997)]

The father, Charles Everette Sharpe, Jr. and the mother, Sylvia G. Nobles, parented one child born on 21 November 1984. Following their separation and divorce, the mother obtained primary custody of their child.

In their separation agreement of 13 December 1988, which was incorporated into their divorce decree, the father agreed to invest \$50 per month for the child's college education. After their divorce, the father and mother signed a Consent Judgment dated 2 August 1990 that, in part, directed the father to pay \$500 per month towards the support of his child and to provide the mother evidence with where the father was making the investments for the child's college education.

In 1990, the father began to work for North Star of North Carolina, Inc. By 1995, the father was a district director, and made a salary of \$56,439 per year. On 30 September 1995, the company abolished his position. The next day, the father started working at another job with North Star as manager of a nursing home which paid a salary of \$46,540 per year.

On 12 October 1995, after a hearing on modification of his child support and for contempt, the trial court ordered the father to pay \$596 per month in child support based on a finding that projected the father would earn \$61,368 per year. Furthermore, the trial court found that the father had failed to invest \$50 per month for the child's college education and therefore ordered the father to invest \$4,100 to make up for the deficiency, and to certify to the mother where the money was invested. The trial court also ordered the father to provide medical and dental insurance to the child, as was set forth in the 2 August 1990 Consent Judgment.

On 2 April 1996, the father moved for a modification of his child support obligation. Prior to a hearing on that motion, the father took a job with a new division of North Star that paid a reduced salary of \$40,000 per year.

In response to the father's motion for modification of child support, the mother counter-moved for contempt contending that the father had failed to comply with the court's order of 12 October 1995 by: (1) failing to send certification of the deposit of the \$4,100 to her, and (2) failing to send her any new claim forms, insurance cards, or informational brochures for the medical insurance that the father was required to maintain for the child.

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[127 N.C. App. 705 (1997)]

After hearing evidence, the district court found that although a substantial change of circumstances had occurred since the time of its last child support order, the father had voluntarily depressed his income. The court therefore applied the earning capacity rule in calculating the father's child support obligation. Additionally, the trial court found the father in willful civil contempt of the 12 October 1995 order for failing to provide the mother with certification of where he deposited the college investment funds and for failing to provide the mother with identification cards, claim forms, and information about the health insurance carried on the minor child.

From this order, the father appeals.

I.

[1] The father first contends that the trial court's findings were insufficient to support the use of the earning capacity rule in calculating his child support obligation. We agree.

Child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified. *Askew v. Askew*, 119 N.C. App. 242, 244-245, 458 S.E.2d 217, 219 (1995). A party's earning capacity may be used to calculate the award if he deliberately depressed his income or deliberately acted in disregard of his obligation to provide support. *Id.* However, before using the earnings capacity rule there must be a showing that the actions which reduced a party's income were not taken in good faith. *Id.* at 245, 458 S.E.2d at 219.

In the present case, the father worked as a district director of North Star, at a salary of \$56,439 per year, until the company abolished the position on 30 September 1995. On 1 October 1995, the company moved the father to the position of manager of a nursing home, at a salary of \$46,540 per year. On 1 May 1996, the father took a position with a new division of North Star, where his pay was \$40,000 per year. The trial court found:

14. That since the pay of the plaintiff was reduced to some \$56,000.00 down to \$46,000.00 and then down to \$40,000.00 as he contends, that the plaintiff has not made any application for employment at some other location and that he has not sought the assistance or the services of a private employment agency in order to obtain employment compared to what he was earning prior to the two (2) recent reductions and the Court finds that the reduction to the \$40,000.00 is voluntary on the part of the plain-

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tiff in that he has taken no action to find employment that would be comparable to the pay that he was earning through the year 1995 and the Court finds that the plaintiff has an ability to earn a gross pay of at least \$55,729.00 as shown on his 1995 United States individual income tax returns.

15. That the plaintiff has moved into a home that occupies one and one-half ($1\frac{1}{2}$) acres on Kerr Lake and that he owns two (2) motor vehicles, a 1995 Jeep and a 1996 Accura. That the plaintiff has the ability to at least earn \$55,729.00 that he earned in 1995.

These findings were insufficient to support a conclusion of deliberate depression of income or other bad faith action on the part of the father. Essentially, the findings are that the father's reductions in income were voluntary because he had not looked for work that would pay him what he made before changing jobs. This is not a showing of a deliberate depression of income or other bad faith. Accordingly, the trial court's order is reversed and remanded for an appropriate determination of the father's child support obligation.

II.

[2] The father next argues that the trial court erred in finding him in willful civil contempt because the evidence was insufficient to show that he willfully violated the 12 October 1995 order to deposit \$4,100 and send confirmation of the deposit to the mother. We disagree.

Although the statutes governing civil contempt do not expressly require willful conduct, *see* N.C. Gen. Stat. §§ 5A-21 to 5A-25 (1986), case law has interpreted the statutes to require an element of willfulness. *Smith v. Smith*, 121 N.C. App. 334, 336, 465 S.E.2d 52, 53-54 (1996). In the context of a failure to comply with a court order, the evidence must show that the person was guilty of "knowledge and stubborn resistance" in order to support a finding of willful disobedience. *Hancock v. Hancock*, 122 N.C. App. 518, 525, 471 S.E.2d 415, 419 (1996). The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. *Koufman v. Koufman*, 97 N.C. App. 227, 230, 388 S.E.2d 207, 209 (1990), *rev'd on other grounds*, 330 N.C. 93, 408 S.E.2d 729 (1991).

In this case, the trial court's order included the following finding of fact:

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18. That with regard to the contempt matter, the Court finds that in its Order of October 12, 1995, the plaintiff had not deposited the \$4,100.00 which was to begin in August of 1990 at the rate of \$50.00 per month and that the plaintiff was found in wilful contempt on October 12, 1995, and ordered to pay the sum of \$4,100.00 being due into some type of income producing plan with a certified copy of this investment to be furnished to the defendant. That the Court stayed the incarceration allowing the plaintiff until November 10, 1995, to invest the money and to allow him until November 15, 1995, to get the certification as to where these funds are being held in an income producing plan to the defendant and that the reports of these earnings of this investment shall be forwarded to both the plaintiff and the defendant. That the plaintiff failed to furnish the certified copies as to where these funds were invested to the defendant. That the evidence tends to show that the plaintiff furnished of [sic] this investment to his former lawyer, Mr. Worthington, but that no notification was given to the defendant as the Court ordered.

The record contains competent evidence to support this finding of fact. Furthermore, this finding sufficiently supports the conclusion that the father acted with a bad faith disregard for the law. The father was given ample time to comply with the court's order. There does not appear to be any reason why the father could not have complied with the court's order, especially when considering that he was able to give the notice to his former attorney. The father's continuing failure to comply with the court's order supports the trial court's conclusion that the father was in willful civil contempt.

III.

[3] The father next argues that the trial court committed error by finding that he was in contempt of the 12 October 1995 order to provide the mother with an insurance card and claim forms. We do not address this issue because the father failed to properly present the issue to this Court for review.

The 12 October 1995 court order provided:

9. That the plaintiff shall provide medical and dental insurance on behalf of the minor child as previously *ordered by this Court in August 2, 1990 Order.*

(emphasis added).

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[127 N.C. App. 711 (1997)]

The father did not include the 2 August 1990 order in the record. Under N.C.R. App. P. 9(a)(1)(d) the record on appeal must contain “copies of the pleadings, and of any pre-trial order on which the case or any part thereof was tried.” Here, without the 2 August 1990 order this Court is left to guess at what that order required the father to do, and in its absence we decline to consider the father’s arguments that he had complied with its requirements.

Having carefully considered appellant’s other arguments, we find them to be meritless and do not discuss them further.

Affirmed in part, reversed in part, and remanded.

Judges GREENE and MARTIN, Mark D., concur.



THOMAS AARON, EMPLOYEE, PLAINTIFF V. NEW FORTIS HOMES, INC., EMPLOYER, AND
THE MARYLAND INSURANCE GROUP, INSURANCE CARRIER, DEFENDANTS

No. COA96-1539

(Filed 18 November 1997)

1. Workers’ Compensation § 149 (NCI4th)— injury while taking supervisor to hospital—special errand

The Industrial Commission did not err by finding in a workers’ compensation action that plaintiff’s injuries were caused by an accident arising out of and in the course of his employment where plaintiff was a roofer and construction worker; his supervisor stepped on a nail and asked plaintiff to take him to the hospital; plaintiff was injured in an automobile accident on the way to the hospital; and he was unable to return to work due to his injuries. This journey was brought into the course of employment because plaintiff was performing a “special errand” that directly benefitted the employer in that treatment of the supervisor was necessary before work could continue and in that defendant’s exposure to a more serious workers’ compensation claim was reduced by obtaining proper treatment for the injury.

2. Workers' Compensation § 120 (NCI4th)— knee injury— previous degeneration— injury consistent with accident— no previous pain

There was competent evidence to support the Industrial Commission's finding in a workers' compensation action that plaintiff's knee injury is causally related to an automobile accident suffered in the course of his employment where plaintiff had various degenerative changes and other conditions of the knee that predated the accident, but plaintiff's doctor testified that plaintiff's injuries were "entirely consistent" with the automobile accident and could have been caused by the accident, and plaintiff testified that he had no ligament damage prior to the accident and that he had never before seen a doctor for knee problems or knee pain.

3. Workers' Compensation § 228 (NCI4th)— disability— doctor's restriction

There was competent evidence to support the Industrial Commission's finding that a workers' compensation plaintiff remained totally disabled as of the date of the hearing where plaintiff's doctor restricted him from any work until he had knee surgery and plaintiff had not yet had the surgery.

4. Workers' Compensation § 260 (NCI4th)— average weekly wage— Form 22— other sources

The Industrial Commission erred in a workers' compensation action by denying defendants' motion for a new hearing or to take additional evidence on the issue of plaintiffs' wages and benefits where the Form 22 relied upon in determining plaintiff's average weekly wage included income from other sources.

Appeal by defendants from opinion and award entered 16 September 1996 by the Full Commission. Heard in the Court of Appeals 9 September 1997.

On 30 April 1994, plaintiff, a 30-year-old roofer and construction worker, was working on a home being built by defendant-employer, New Fortis Homes, Inc. While stepping down from a ladder, plaintiff's supervisor, Thomas McDuff, stepped on a nail and injured himself, requiring medical assistance. Accordingly, McDuff asked the plaintiff, Thomas Aaron, to take him to the hospital. Aaron agreed and on the way to the hospital, he became involved in an automobile accident and sustained disabling feet, leg, and facial injuries. Aaron underwent

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[127 N.C. App. 711 (1997)]

medical treatment and was unable to return to work due to his injuries. Aaron remains incapable of earning wages and has not been released for any type of work. Aaron initiated this proceeding seeking workers' compensation benefits for injuries resulting from the automobile accident.

The matter was initially heard before a Deputy Commissioner on 1 March 1995. The parties agreed by stipulation to determine plaintiff's wages using a Form 22 Wage Chart under the belief that New Fortis Homes would have records of wages paid to Aaron. Accordingly, wages were not an issue at the hearing. Following the hearing, the Deputy Commissioner gave defendants thirty days within which to submit a Form 22 Wage Chart.

Following the hearing, defendants discovered that they had documentation only of amounts paid to McDuff, who was the contractor on the crew that included Aaron. In an effort to determine Aaron's wages, defendants requested that plaintiff's attorney (who also represented McDuff) procure wage records. As a result, plaintiff himself filled out the Form 22 for submission to the Industrial Commission, including income from sources other than New Fortis Homes, Inc., and McDuff signed and certified it. On 3 April 1995, defendants notified the deputy commissioner regarding the Form 22 and asked for a thirty (30) day extension to obtain the wage records. On 3 May 1995, defendants notified the deputy commissioner that they would not stipulate to the Form 22 and requested that the record be left open until defendants could depose McDuff.

In an Opinion and Award filed 19 February 1996, the Deputy Commissioner ruled in favor of plaintiff and awarded him total temporary disability compensation of \$466/week as determined by the Form 22 Wage Chart. Defendants appealed and filed a Motion for New Hearing to Take Additional Evidence or for the Commission to Receive Further Evidence.

By Opinion and Award dated 16 September 1996, the Full Commission affirmed the Deputy Commissioner's decision. The Commission concluded that plaintiff was on a special errand that benefitted his employer. Accordingly, the injury arose out of and occurred in the course of employment. The Commission also denied defendants' motions, reasoning that defendants should have requested additional time to complete the record prior to its being closed. Defendants appeal.

Law Offices of Nancy P. White, by Nancy P. White and J. David Stradley, for plaintiff-appellee.

Wishart, Norris, Henninger & Pittman, P.A., by W. Timothy Moreau, for defendant-appellants.

EAGLES, Judge.

[1] We first consider whether the Commission erred in finding that plaintiff's injuries were caused by an accident arising out of and in the course of his employment with New Fortis Homes, Inc. The standard of appellate review of an opinion and award of the Industrial Commission is well established. Our review "is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its legal conclusions." *Counts v. Black & Decker Corp.*, 121 N.C. App. 387, 389, 465 S.E.2d 343, 345, *disc. review denied*, 343 N.C. 305, 471 S.E.2d 68 (1996) (citing *Watkins v. City of Asheville*, 99 N.C. App. 302, 392 S.E.2d 754, *disc. review denied*, 327 N.C. 488, 397 S.E.2d 238 (1990)).

Defendants first contend that the so-called "Going and Coming" rule applies to bar plaintiff's claim, arguing that injuries occurring while a covered worker is traveling to and from his place of employment are not compensable. *See Jennings v. Backyard Burgers of Asheville*, 123 N.C. App. 129, 131, 472 S.E.2d 205, 207 (1996). Defendant further argues that the "special errand" exception to the "Going and Coming" rule does not apply. Defendant contends the accident did not arise in the course of employment because plaintiff was not performing any specific duties for defendant and that the trip did not benefit the employer. Further, defendant argues, under the "increased risk" analysis, the hazard was common and plaintiff was not exposed to a greater danger than that of the general public. *See Roberts v. Burlington Industries, Inc.*, 321 N.C. 350, 358, 364 S.E.2d 417, 422-23 (1988). We are not persuaded.

The Industrial Commission concluded that the accident occurred while plaintiff was performing a special errand that benefitted the employer. There were sufficient findings of fact supported by competent evidence on the record to support that conclusion of law.

Ordinarily, an injury occurring while an employee travels to or from work does not arise in the course of employment and is not compensable. *See Jennings*, 193 N.C. App. at 131, 472 S.E.2d at

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[127 N.C. App. 711 (1997)]

207. The evidence here showed that the automobile accident occurred as plaintiff was in route from the worksite to the hospital while transporting a fellow employee, McDuff. Furthermore, travel was not an incident of plaintiff's employment as a roofer and construction worker. See *Hicks v. Brown Shoe Co.*, 64 N.C. App. 144, 147, 306 S.E.2d 543, 544 (1983), *disc. review denied*, 311 N.C. 304, 317 S.E.2d 680 (1984) (injury arose in course of employment where traveling shoe salesperson killed while driving from one sales call to another).

The journey here was brought into the course of employment because plaintiff was performing a "special errand" that directly benefitted the employer. See *McBride v. Peony Corp.*, 84 N.C. App. 221, 352 S.E.2d 236 (1987). There was testimony that McDuff had been injured on the job and required medical attention and that treatment was necessary before work could continue. Further, by protecting the health of McDuff and obtaining proper treatment for his injury, New Fortis Homes' exposure to a more serious workers' compensation claim by McDuff was reduced. Accordingly, we conclude there was competent evidence of record and adequate findings of fact to support the Commission's conclusion that the automobile accident occurred while plaintiff was on a "special errand" for defendant-employer.

We next consider whether the Commission erred in finding that plaintiff's injuries were causally related to the automobile accident and that plaintiff remains incapable of earning any wages since the accident.

[2] Defendants claim that plaintiff has failed to prove that his right knee problems were causally related to the automobile accident. The plaintiff had various degenerative changes and other conditions of the knee that predated the accident. Plaintiff's treating physician, Dr. Edmund Campion, testified that there was "absolutely no way of telling" whether plaintiff's knee problems were caused by an old injury or a new injury. Additionally, defendants claim that there is evidence that plaintiff is working. Accordingly, defendants argue that plaintiff obviously is capable of earning wages.

There is competent evidence to support the Commission's finding that plaintiff's knee injury is causally related to the automobile accident. Our Supreme Court stated the standard of medical proof in workers' compensation cases in *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E.2d 389 (1980):

There must be competent evidence to support the inference that the accident in question resulted in the injury complained of, i. e., some evidence that the accident at least might have or could have produced the particular disability in question.

Id. at 167, 265 S.E.2d at 391. Dr. Champion testified that the plaintiff's injuries were "entirely consistent" with the automobile accident and could have been caused by the accident. Additionally, plaintiff testified that he had no ligament damage prior to the accident and that he had never before seen a doctor for knee problems or knee pain. Accordingly, we conclude that there was competent evidence of record and adequate findings of fact to support the Commission's conclusion that the plaintiff's knee injury was causally related to the automobile accident.

[3] There was also competent evidence of record to support the Commission's finding that plaintiff remained totally disabled as of the date of the hearing. Dr. Champion restricted plaintiff from any work until he had knee surgery. As of the date of the hearing, the plaintiff had not yet had knee surgery and Dr. Champion's advice remained in effect. Accordingly, there was sufficient evidence to support the Commission's findings.

[4] Finally, we consider whether the Commission erred in determining plaintiff's average weekly wage and in denying defendants' motion for a new hearing or to take additional evidence. The cause must be remanded for the taking of additional evidence on the issue of plaintiff's wages and benefits.

The Form 22 relied upon in determining plaintiff's average weekly wage included income from sources other than New Fortis Homes, Inc. The calculation of an employee's average wage is governed by G.S. 97-2(5). In construing G.S. 97-2(5), our Supreme Court recently stated that the definition of average weekly wage and the methods of computing such wages set out in the statute "do not allow the inclusion of wages or income earned in employment or work other than that in which the employee was injured." *McAninch v. Buncombe County Schools*, 347 N.C. 126, 489 S.E.2d 375, 380 (1997). The evidence before the Commission on the issue of wages, the Form 22, included wages from sources other than New Fortis Homes, Inc. Accordingly, on remand the Commission should take new evidence and calculate plaintiff's average weekly wage but not include wages from sources other than New Fortis Homes, Inc.

HOWELL v. CLYDE

[127 N.C. App. 717 (1997)]

In sum, the Industrial Commission's conclusion that plaintiff's injuries arose out of and in the course of employment with New Fortis Homes, Inc. is affirmed. The Industrial Commission's conclusion that plaintiff's injuries are causally related to the automobile accident and that he remains incapable of earning any wages is affirmed. Finally, the Industrial Commission's determination of plaintiff's average weekly wage and its denial of defendant's motion for a new hearing or to take additional evidence are reversed. The cause is remanded to the Commission for hearing and determination of plaintiff's average weekly wage and appropriate award.

Affirmed in part, reversed in part, and remanded.

Judges MARTIN, John C., and TIMMONS-GOODSON concur.

RAYMOND P. HOWELL, PLAINTIFF v. DAVID CLYDE, DEFENDANT

No. COA96-1264

(Filed 18 November 1997)

1. Easements § 10 (NCI4th)— creation of defeasible easement

An instrument conveyed a defeasible easement, either determinable or subject to conditions subsequent, where it provided that if all or any one part of stated conditions are violated, the instrument shall be void and the grantors or their heirs and assigns may re-enter and take possession of the easement.

2. Easements § 48 (NCI4th)— defeasible easement—termination—recordation not required

Recordation of a purported termination of a defeasible access easement, whether determinable or subject to conditions subsequent, was not required to make such termination effective as against a bona fide purchaser for value of the property benefited by the easement.

Appeal by defendant from judgment entered 9 August 1996 by Judge R. Alexander Lyerly in Watauga County District Court. Heard in the Court of Appeals 21 May 1997.

HOWELL v. CLYDE

[127 N.C. App. 717 (1997)]

di Santi Watson, by Anthony S. di Santi, for plaintiff-appellee.

McElwee & McElwee, by John M. Logsdon, for defendant-appellant.

JOHN, Judge.

Defendant appeals the trial court's entry of summary judgment in favor of plaintiff. In this controversy regarding an easement granted to plaintiff's predecessors in title, defendant contends the court erroneously concluded that the recording statute, N.C.G.S. § 47-18 (1984), protected plaintiff as a bona fide purchaser for value from oral termination of the easement. We reverse the trial court.

Pertinent facts and procedural history include the following: In an agreement dated 15 September 1969 and recorded 22 September 1969, Ray A. Warren and spouse Hazel Warren (the Warrens) granted to Scenic Views, Inc. (Scenic Views), a 30 foot wide access easement (the easement) across certain property the couple owned in Watauga County. The instrument granting the easement provided, *inter alia*, as follows:

As a substantial part of the consideration, for this easement, the party of the second part, its successors and assigns, agrees to faithfully perform the following conditions:

1. That legally binding restrictions will be imposed upon the property owned by the party of the second part, its successors and assigns, and to which the easement is granting access, limiting said property to residential use, and that no trailers, trailer park, campground, shacks, or outside toilets, shall be erected thereon.

....

It is specifically agreed that the party of the second part, its successors and assigns will faithfully perform the foregoing conditions and that if all or any one part thereof is violated, this instrument shall be void and the parties of the first part or their heirs and assigns, may re-enter and take possession of the above described access route.

By a series of mesne conveyances, plaintiff acquired the property benefitted by the easement and previously owned by Scenic Views. Likewise by a series of mesne conveyances, defendant acquired the property previously owned by the Warrens. The deeds of both

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plaintiff and defendant specifically refer to the easement. Neither the respective chains of title nor validity of the various deeds are in dispute.

Defendant asserts, and “for purposes of summary judgment” plaintiff does not contest, that conditions contained in the instrument granting the easement were breached when plaintiff’s predecessors in title, Norbert F. Goode and Myra V. Mayse, raised goats for commercial purposes and located a trailer on the property. Defendant allegedly informed Goode and Mayse that the easement was terminated, and thereafter locked the gates located at either end of the easement. No instrument terminating the easement was recorded.

Plaintiff purchased the Scenic View property and recorded the conveyance 21 June 1995. At about the same time, he went to defendant’s home and obtained the combination for the locks on the gates controlling the easement. The parties do not agree as to whether this occurred prior or subsequent to plaintiff’s purchase of the property. Similarly disputed is whether plaintiff took possession of the property subject to notice that defendant believed the easement was terminated.

On 19 February 1996, plaintiff initiated the instant declaratory judgment action seeking interpretation of the instrument granting the easement. Plaintiff’s complaint included a prayer for both preliminary and permanent injunctions precluding defendant from denying plaintiff access to the easement. Plaintiff also sought damages for the alleged wrongful denial of his access to the easement. A preliminary injunction issued 4 March 1996 in Watauga County District Court.

Defendant answered, and by means of counterclaim, asserted the easement granted to plaintiff’s predecessors in title was a defeasible easement which had been terminated:

The easement . . . was either a determinable easement, which terminated automatically when the express conditions were violated, or an easement subject to conditions subsequent, which terminated when the defendant re-entered and took possession of the easement after the conditions were violated by informing the owners of the property of the termination and locking the gate to the property.

By way of the counterclaim, defendant sought the court’s directive quieting title to his property. Plaintiff’s reply alleged that any purported termination of the easement was unrecorded, and that plain-

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tiff's continued rights in the easement as a bona fide purchaser for value were thus superior to those of defendant.

Plaintiff's 9 May 1996 summary judgment motion came on for hearing 17 July 1996. In an order entered 9 August 1996, the trial court set out the following conclusions of law:

1. An easement is an interest in real property, and the provisions of the Connor Act . . . are applicable to easements in real property.
2. The Connor Act was enacted for the purpose of providing a plan and a method by which an intending purchaser or encumbrancer can safely determine just what kind of title he is in fact obtaining.
3. The purpose of the Connor Act is to give notice, and where the index is sufficient to put a careful and prudent examiner upon inquiry, the records are notice of all matters which would be discovered by reasonable inquiry. The records are intended to be self-sufficient, and a person examining a title is not required to go out upon the premises and ascertain who is in possession and under what claim.
4. For a termination of an easement in real property to be effective and applicable to a bona fide purchaser for value, a sufficient notice of the termination must be recorded in the county where the real property is located to comply with the provisions of the Connor Act.

The court thereupon entered summary judgment in favor of plaintiff and permanently enjoined defendant from interfering with the recorded easement. Defendant timely appealed.

On 6 September 1996, defendant moved to suspend the judgment pursuant to N.C.G.S. § 1A-1 Rule 62(c) (1990). Following a 14 October 1996 hearing, the motion was denied. On 24 October 1996, defendant petitioned this Court seeking a temporary stay of the judgment and issuance of a writ of supersedeas. An order allowing the temporary stay issued 24 October 1996. The stay was dissolved and the "Petition for Writ of Supersedeas" allowed in an order entered 6 November 1996.

N.C.G.S. § 47-27 (1984) provides as follows:

No deed, agreement for right-of-way, or easement of any character shall be valid as against any creditor or purchaser for a valu-

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able consideration but from the registration thereof within the county where the land affected thereby lies.

As a result,

the first to record an interest in land holds an interest superior to all other purchasers for value, regardless of actual or constructive notice as to other, unrecorded conveyances.

Rowe v. Walker, 114 N.C. App. 36, 39, 441 S.E.2d 156, 158 (1994), *aff'd per curiam*, 340 N.C. 107, 455 S.E.2d 160 (1995).

The question presented herein is whether defendant's failure to record the alleged termination of the easement accorded plaintiff a superior interest therein. This Court was confronted with a similar problem in *Price v. Bunn*, 13 N.C. App. 652, 187 S.E.2d 423 (1972).

In *Price*, we considered the effect of a deed granting an easement to flood and impound water upon the grantor's lands "forever or so long as" the grantee or successors used the easement, and providing that in the event the grantee

should fail to keep up and maintain the dam across Moccasin Creek, and should fail to use the rights and privileges . . . for the period of five years, the terms of this easement shall become null and void and of no effect, and the property and rights herein given, granted, and conveyed, shall revert to [the grantor].

Id. at 655, 187 S.E.2d at 425.

We held the language of the deed accorded to the grantee a determinable, or defeasible, easement, and noted that

[t]he estate known as the fee simple determinable is created when apt and appropriate language is used by a grantor or devisor indicative of an intent on the part of the grantor or devisor that a fee simple estate conveyed or devised will expire *automatically* upon the happening of a certain event or upon the discontinuance of certain existing facts. Typical language creating such estates may specify that the grantee or devisee shall have land "until" some event occurs, or "while," "during," or "for so long as" some state of facts continues to exist. Upon the happening of the specified event, the fee simple determinable automatically terminates, and reverts to the grantor or to his heirs. . . . When the specified event occurs, the possessory estate of the

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grantee or devisee ends by operation of law automatically and without the necessity of any act or re-entry, without the institution of any lawsuit, or the intervention of any court.

Id. at 659, 187 S.E.2d at 427 (quoting Webster, Real Estate Law in North Carolina, § 35, p. 49) (emphasis in Webster).

The dam at issue in *Price* had washed out prior to 1951, and was not rebuilt until 1966. We held that the failure of the grantee or his successors to exercise the rights granted by the easement for a period of five years following grant thereof caused automatic termination of the easement and reversion of the rights and interests previously created to the grantor and his successors. *Price*, 13 N.C. App. at 660, 187 S.E.2d at 428.

[1] We conclude the instrument granting the easement *sub judice* contained certain conditions upon the occurrence of which the easement was defeasible. The instrument provided that “if all or any one part” of the stated conditions

is violated, this instrument shall be void and the parties of the first part or their heirs and assigns, may re-enter and take possession of the above described [easement].

Whether the defeasible easement conveyed by the instrument was a determinable easement as in *Price* or an easement subject to a condition subsequent, as defendant pleads alternatively, is an issue we need not resolve at this juncture. The trial court entered summary judgment in favor of plaintiff solely in consequence of its determination that the undisputed facts showed defendant had failed to record any purported termination of the easement. The court thus considered plaintiff’s duly recorded interest in the easement to be superior as a matter of law to that of defendant.

[2] However, *Price* and *Higdon v. Davis*, 315 N.C. 208, 337 S.E.2d 543 (1986), indicate that recordation of termination of the easement, whether determinable or subject to conditions subsequent, was not required to make such termination effective as against plaintiff. In the case of a determinable easement, “reverter is automatic upon the happening of the determining event,” whereas with an easement subject to a condition subsequent, the grantor or successors thereto “must re-enter after breach of the condition in order to terminate the grantee’s fee” unless “owner of the servient tract is already in possession.” *Id.* at 216, 337 S.E.2d at 547-48. Plaintiff has cited no authority, nor have we located any, requiring the further step of recordation

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to terminate a defeasible easement under the circumstances *sub judice*. See *Lawing v. Jaynes* and *Lawing v. McLean*, 285 N.C. 418, 206 S.E.2d 162 (1974) (registration of instrument not entitled or required by statute to be recorded not constructive notice to subsequent purchasers). We therefore reverse the trial court's judgment grounded exclusively upon defendant's failure to record the alleged termination of the easement and remand this case for further proceedings.

Reversed and remanded.

Judges GREENE and WALKER concur.

STANLY COUNTY DEPT. OF SOCIAL SERVICES EX REL. STACY DENNIS,
PLAINTIFF/APPELLANT V. JOHN REEDER, JR., DEFENDANT/APELLEE

No. COA96-1189

(Filed 18 November 1997)

1. Adoption or Placement for Adoption § 51 (NCI4th)— illegitimate child—consent to adoption—parental rights not terminated

A father's consent to the adoption of his illegitimate daughter did not terminate his parental rights and obligations. Rather, the final order of adoption would terminate his parental rights.

2. Adoption or Placement for Adoption § 30 (NCI4th)— illegitimate child—consent to adoption—agreement to terminate support obligation—void as against public policy

A father's consent to the adoption of his illegitimate daughter violated N.C.G.S. § 48-37 and was void as contrary to public policy where consent was given in exchange for the termination of his child support obligations and the mother's agreement not to pursue either prospective or past child support. Therefore, the father's obligation to provide support continued until entry of a final adoption order, which never occurred, and the consent agreement could not be used to estop the county DSS from seeking reimbursement for public assistance provided for the child subsequent to the consent order.

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[127 N.C. App. 723 (1997)]

Appeal by plaintiff from order entered 21 May 1996 by Judge Joseph J. Williams in Stanly County District Court. Heard in the Court of Appeals 18 August 1997.

On 7 December 1986 Summer Nicole Honeycutt was born to plaintiff Stacy Dennis (then Honeycutt) and defendant John W. Reeder, Jr., who were not married. Pursuant to a Voluntary Support Agreement, filed by plaintiff Stanly County Department of Social Services (DSS) on behalf of plaintiff Stacy Dennis, defendant was ordered on 4 September 1987 to pay child support and repay past paid public assistance.

On or about 26 February 1992, after a hearing upon defendant's motion to establish visitation times, a consent order was entered, terminating defendant's child support and visitation obligations but not releasing him from his obligation to pay public assistance arrears. Defendant agreed to give consent for Randy James Dennis, Honeycutt's new husband, to adopt Summer. The consent order also provided that the mother "expressly waives and relinquishes all sums accrued and payable to her for child support," and that she would not pursue prospective child support or "take any action to create any additional liability" for defendant for prospective public assistance.

However, when Randy and Stacy Dennis separated, and the adoption of Summer did not take place, Stacy Dennis began receiving public assistance again, and plaintiff DSS filed a motion to reopen the child support case.

After a hearing, the trial court denied DSS's motion to reopen the case, concluding "as a matter of law that the Defendant lived up to his terms of the bargain in the February 25, 1992 consent order, which order effectively terminated the parental rights of the Defendant, therefore he is not responsible for the support of the child Summer Honeycutt." Plaintiff appeals.

Stanly County Department of Social Services, by John W. Webster, for plaintiff appellant.

No brief for defendant appellee.

ARNOLD, Chief Judge.

The essential issue on appeal is whether defendant's consent to the adoption of his child terminated his parental rights. This case falls

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under the adoption statutes in effect prior to the 1995 revision of Chapter 48.

The order appealed from, denying DSS's motion to reopen the child support case, is based upon the February 1992 consent order, which included the following findings of fact:

6. Reeder has agreed to execute a consent to adopt the named minor child to Randy James Dennis, the spouse of Honeycutt.

7. Honeycutt has agreed upon entry of this Order in open Court on February 26, 1992, to terminate all obligations of support of the minor child from Reeder.

....

10. In the event Reeder should revoke the consent to adopt, the orders of support shall be reinstated retroactively to this date.

11. Honeycutt expressly waives and relinquishes all sums accrued and payable to her for child support.

Consequently, the consent order required that

(a) Reeder will execute and deliver to Honeycutt a consent to adopt the minor child, Summer Nicole Honeycutt, for Randy James Dennis.

(b) The obligations of child support, including arrears, of Reeder for the minor child is [sic] terminated immediately, and Honeycutt shall not hereafter pursue prospective child support from Reeder.

(c) Reeder shall not pursue nor attempt to exercise visitation with the minor child.

(d) Reeder shall repay to the Department of Social Service [sic] the past public assistance (AFDC) owing, on a schedule arranged with said agency.

(e) Honeycutt shall not take any action to create any additional liability for Reeder to the Department of Social Services nor the State of North Carolina for prospective public assistance.

(f) In the event of Reeder's failure or refusal to execute the consent to adopt, any extension thereof, or the revocation of a consent to adopt, the orders of support shall be reinstated retroactively to this date.

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On 21 May 1996 the trial court dismissed plaintiff's motion to reopen the child support case, finding, *inter alia*:

2. That by a consent order dated February 25, 1992 . . . the Defendant terminated support for his minor child, Summer Honeycutt
3. That the Defendant agreed in the consent order to execute a consent to adopt the minor child to Randy James Dennis, the spouse of the Plaintiff at that time; that such consent was signed but that the adoption was not completed.
4. That the Defendant agreed and was ordered not to pursue nor attempt to exercise visitation with the minor child.

Based on these findings, the court concluded "as a matter of law that the Defendant lived up to his terms of the bargain in the February 25, 1992 consent order, *which order effectively terminated the parental rights of the Defendant*, therefore he is not responsible for the support of the child Summer Honeycutt." (Emphasis added.)

While termination of a father's rights *may* precede an adoption petition, prior termination under Chapter 7A is not necessary if the father's consent to the adoption is not required under the applicable provisions of Chapter 48. *In re Adoption of Clark*, 95 N.C. App. 1, 7, 381 S.E.2d 835, 838 (1989), *rev'd on other grounds*, 327 N.C. 61, 393 S.E.2d 791 (1990). Instead, his parental rights are then terminated by the final order of adoption under N.C. Gen. Stat. § 48-23 (1991). *In re Adoption of Clark*, 95 N.C. App. at 7, 381 S.E.2d at 838.

[1] Although defendant in this case gave consent for Randy Dennis to adopt his daughter, clearly such consent did not act to terminate his parental rights and obligations. Section 48-23(2) plainly states: "The biological parents of the person adopted, if living, shall, *from and after the entry of the final order of adoption*, be relieved of all legal duties and obligations due from them to the person adopted, and shall be divested of all rights with respect to such person." G.S. § 48-23(2) (emphasis added); *see In re Adoption of Clark*, 95 N.C. App. at 7, 381 S.E.2d at 838. The adoption statutes provide that an adoption can take place only after consent by the natural parent, when such consent is necessary, unless parental rights have already been terminated otherwise. *See* N.C. Gen. Stat. §§ 48-5, -6, -7 (1991). If, as the trial court erroneously concluded below, a father's consent to adoption effectively terminates his parental rights, the language of G.S. § 48-23(2), which provides that parental rights are terminated

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“from and after the entry of the final order of adoption,” would be mere surplusage. Absent prior formal proceedings terminating parental rights under Article 24B of Chapter 7A, the final order of adoption, and not the *consent* to adoption, terminates parental rights. See *Rhodes v. Henderson*, 14 N.C. App. 404, 407, 188 S.E.2d 565, 567 (1972) (final decree of adoption terminates the relationship between natural parent and child).

[2] Moreover, in this case the father's consent to the adoption of his child was void as against public policy. The February 1992 consent order essentially provided that defendant agreed to execute a consent to adopt in exchange for the mother's express waiver and relinquishment of “all sums accrued and payable to her for child support” and her agreement not to pursue prospective child support. In *State ex rel. Raines v. Gilbert*, 117 N.C. App. 129, 450 S.E.2d 1 (1994), this Court held: “A person who gives or receives *any consideration* for ‘receiving or placing . . . any child for adoption’ . . . acts contrary to the public policy of North Carolina.” *Id.* at 131, 450 S.E.2d at 2 (quoting G.S. § 48-37 (1991)). Agreements that are contrary to public policy are void. *Id.*

In *Raines*, the trial court concluded that the mother was equitably estopped from collecting child support arrears because she had promised she would not pursue an action for child support arrears in exchange for the father's consent to the adoption. *Id.* This Court found that such an agreement violated G.S. § 48-37 “in that both the Mother and the Father gave and received consideration for the placement of the child for adoption.” *Raines*, 117 N.C. App. at 131, 450 S.E.2d at 2.

Likewise, in this case defendant's agreement to consent to the adoption of his child violated G.S. § 48-37 and was void as contrary to public policy, in that it was in exchange for the termination of his child support obligations and the mother's agreement not to pursue child support, either prospective or in arrears. Therefore, the consent agreement cannot be used to estop DSS from reopening the child support case and seeking reimbursement for the public assistance paid subsequent to the consent order.

In *State of Michigan v. Pruitt*, 94 N.C. App. 713, 380 S.E.2d 809 (1989), this Court found that in the absence of evidence that the mother waived her right to past due child support payments, the subsequent adoption did not affect the father's pre-adoption obligation to provide support for his children. *Id.* at 715, 380 S.E.2d at 810. “The

father's obligation to provide support for his children was a continuing one which ceased only when the children were adopted by their stepfather." *Id.*

Because we find that the provisions of the consent order relieving defendant of past and future child support obligations in exchange for giving consent to adoption of his child are void as against public policy, defendant's obligation to provide support is continuing until the entry of a final adoption order, which has never taken place.

Our reading of the intended policy and effect of the adoption statutes is supported by the 1995 amendments, which clarify the parental rights of a parent who has given consent to adoption of a child:

Any other parental right and duty of a parent who executed a consent is not terminated until either the decree of adoption becomes final or the relationship of parent and child is otherwise terminated, whichever comes first. Until termination, the minor remains the child of a parent who executed a consent for purposes of any inheritance, succession, insurance, arrears of child support, and other benefit or claim that the minor may have from, through, or against the parent.

N.C. Gen. Stat. § 48-3-607(c) (1995).

Defendant's parental rights and obligations were not terminated by virtue of his consent to the adoption of his child, and the trial court erred in so ruling. The order denying plaintiff's motion to reopen the child support case is

Reversed.

Judges WALKER and McGEE concur.

FIELDCREST CANNON, INC. v. FIREMAN'S FUND INSURANCE CO.

[127 N.C. App. 729 (1997)]

FIELDCREST CANNON, INC., PLAINTIFF v. FIREMAN'S FUND INSURANCE COMPANY,
THE NORTH RIVER INSURANCE COMPANY AND NORTH CAROLINA INSURANCE
GUARANTY ASSOCIATION, DEFENDANTS

No. COA95-721

(Filed 18 November 1997)

Insurance §§ 920, 949 (NCI4th)— employer's liability insurance—discrimination claims—negligent infliction of emotional distress—excess insurer not liable

An employer's "umbrella," excess coverage liability policy imposed no duty on the excess insurer to defend and indemnify the employer for discrimination claims based on sexual discrimination, retaliatory discharge, and intimidation and harassment because those claims do not fall within the "personal injury" coverage provided by the policy. Furthermore, the excess insurer had no duty to defend and indemnify the employer for a claim for negligent infliction of emotional distress because (1) if the jury should find that the primary insurer's policies provide coverage for this claim, the excess insurer is absolved of residual liability by prior agreement of the parties that no claim would exceed the \$500,000 per occurrence limits of the primary insurance, and (2) if the jury should find that this claim is not covered by the primary insurer's policies, the excess insurer is still absolved of liability since the liability of both the primary and excess insurers is based upon similar language.

Defendant Fireman's Fund Insurance Company appealed from order entered 26 April 1993 by Judge Forrest A. Ferrell, and judgment entered 7 December 1994 by Judge John M. Gardner in Mecklenburg County Superior Court. Plaintiff cross-appealed from orders entered 26 April and 30 June 1993 by Judge Ferrell in Mecklenburg County Superior Court. The appeal was heard in this Court on 19 March 1996, and the opinion was filed 5 November 1996. Defendant North Carolina Insurance Guaranty Association (hereinafter "Guaranty") petitioned for rehearing. The petition was granted by order of this Court entered 8 January 1997, and the matter was subsequently heard on the petition to rehear without additional briefs or oral argument. By opinion of this Court filed 2 September 1997, without disturbing our 5 November 1996 opinion as to the remaining parties, summary judgment as to defendant Guaranty was affirmed. Plaintiff and defendant North River Insurance Company (hereinafter "North

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River") jointly petitioned for rehearing. This petition was granted, and the matter was again heard in the Court of Appeals without additional briefs or oral argument.

Blair Conaway Bograd & Martin, P.A., by Bentford E. Martin, for plaintiff-appellee.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by James F. Wood, III; and Patterson, Dilthey, Clay & Bryson, L.L.P., by Ronald C. Dilthey and G. Lawrence Reeves, for defendant-appellant Fireman's Fund Insurance Company.

Wilson & McIlvaine, by Dwight B. Palmer, Jr.; and Robinson, Bradshaw & Hinson, P.A., by Mark W. Merritt and Edward F. Hennessey, IV, for defendant-appellee North River Insurance Company.

Moore & Van Allen, PLLC, by Christopher J. Blake and Joseph W. Eason, for defendant-appellee North Carolina Insurance Guaranty Association.

PER CURIAM.

Only the facts necessary for determination of the issue on rehearing are set out here. For a more complete statement of the facts of this case, see this Court's previous opinion at 124 N.C. App. 232, 477 S.E.2d 59 (1996).

Plaintiff Fieldcrest Cannon, Inc. instituted this action to recover legal defense costs incurred in defending its predecessor, Cannon Mills, Inc. (hereinafter "Cannon"), against certain employment discrimination claims during the 1980's, and to recover sums paid pursuant to judgments and settlements of certain of those claims. Cannon was insured by defendant Fireman's Fund Insurance Company (hereinafter "Fireman's Fund") under four (4) consecutive, identical comprehensive general liability policies written as primary insurance and covering occurrences during the period from 15 May 1978 through and including 15 May 1982.

Defendant North River and Mission Insurance Company (hereinafter "Mission") insured Cannon pursuant to "umbrella" liability policies which were written as excess coverage to defendant Fireman's Fund's primary insurance. Defendant North River's policy covered occurrences during a period from 15 May 1977 through 15 May 1980, and the Mission policy covered occurrences during the

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period of 15 May 1980 through 15 May 1981. When Mission became insolvent in 1987, defendant Guaranty assumed responsibility for certain of Mission's obligations pursuant to the North Carolina Insurance Guaranty Association Act, N.C. Gen. Stat. § 58-48-1, *et seq.*

In this Court's decision filed 5 November 1996, we reversed the trial court's entry of summary judgment in favor of defendant Guaranty premised upon the following: (1) Mission's admission of its duty to defend and fund the underlying discrimination actions; and (2) the trial court's statement in its 30 June 1993 order dismissing plaintiff's action against defendant North River that plaintiff Fireman's Fund's policies fully covered the underlying discrimination claims. In light of our holding that the trial court's order of summary judgment as to Stanley Rosenthal's lawsuit would be reversed, we also reversed the trial court's 26 April 1993 order granting defendant Guaranty's motion for summary judgment. Defendant Guaranty petitioned for rehearing, and by order filed 8 January 1997, we allowed this petition, without additional briefing or oral argument, for the limited purpose of addressing defendant Guaranty's duty to defend and indemnify plaintiff Fieldcrest Cannon in the underlying discrimination claims. In our opinion filed 2 September 1997, we affirmed the entry of summary judgment for defendant Guaranty, but in all other respects, the original opinion of this Court filed 5 November 1996 was adopted and reaffirmed. Plaintiff and defendant North River jointly petitioned for rehearing, and we allowed that joint petition without additional briefing or oral argument, for the limited purpose of addressing plaintiff and defendant North River's argument that our 2 September 1997 opinion is inconsistent with the 5 November 1996 opinion filed in this case.

On rehearing, plaintiff and defendant North River contend that this Court's 2 September 1997 opinion was inapposite to its 5 November 1996 opinion in this same case. We agree, and therefore, withdraw the 2 September 1997 opinion and enter this new opinion consistent with the wording of our earlier 5 November 1996 opinion.

Hence, we again consider whether the trial court erred in determining that there was no genuine issue of fact and as a matter of law Mission's policy imposed no duty to defend and indemnify plaintiff Fieldcrest Cannon in the underlying discrimination actions. Again, we answer in the negative, and accordingly, affirm the trial court's 26 April 1993 order granting defendant Guaranty's motion for summary judgment.

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[127 N.C. App. 729 (1997)]

Mission's umbrella policy defined "personal injury" in the following manner:

"Personal injuries" . . . means bodily injury (including death at any time resulting therefrom), mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, humiliation; also libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any Advertising activities.

The Mission policy by its own terms did not apply "to any liability arising out of the violation of any statute, law, ordinance or regulation prohibiting discrimination or humiliation because of race, creed, colour or national origin[.]"

The definition of personal injury in defendant Fireman's Fund's "Broad Form Comprehensive General Liability Endorsement G222" includes:

- (1) False arrest, detention or imprisonment, or malicious prosecution;
- (2) wrongful entry or eviction or other invasion of the right of private occupancy;
- (3) the publication or utterance
 - (a) of a libel or slander or other defamatory or disparaging material, or
 - (b) in violation of an individual's right of privacy

The Fireman's Fund's policies defined "bodily injury": " 'bodily injury' means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom[.]" In our 5 November 1996 opinion, we noted that there was a genuine issue of material fact as to whether damages for negligent and intentional infliction of emotional distress fall within the "bodily injury" coverage of defendant Fireman's Fund's policies. *Fieldcrest Cannon, Inc. v. Fireman's Fund Insurance Co.*, 124 N.C. App. 232, 477 S.E.2d 59.

Although Mission's policy definition for personal injury is more broad than the applicable definitions included in defendant Fireman's Fund's policies, the bare allegations of the underlying discrimination actions (with the exception of the *Rosenthal* suit) include claims based on sexual discrimination, retaliatory discharge, and intimidat-

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tion and harassment, but fail to make any allegations of "bodily injury (including death at any time resulting therefrom), mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, humiliation; also libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any Advertising activities[.]" so as to fall within the coverage for "personal injury" in Mission's policy. Significantly, Mr. Rosenthal's claim for negligent infliction of emotional distress may fall within the coverage of Mission's policy. However, this fact alone is not determinative of the propriety of summary judgment for defendant Guaranty.

Mission was an "umbrella," excess coverage carrier; as an "umbrella," excess coverage carrier, Mission could not be liable for the underlying discrimination claims unless and until the primary insurers' coverage limits were paid. Here, all parties had agreed that the discrimination claims would not exceed the \$500,000 per occurrence coverage limits of Fireman's Fund's primary insurance. If on remand a jury finds that defendant Fireman's Fund's policies provided coverage for Mr. Rosenthal's claim for negligent infliction of emotional distress, defendant Guaranty is absolved of residual liability by prior agreement of the parties that "the discrimination claims [would] not exceed the \$500,000 per occurrence limits of the Fireman's Fund primary insurance[.]" Similarly, if on remand a jury finds that Mr. Rosenthal's claim for negligent infliction of emotional distress is not covered by defendant Fireman's Fund's policies, defendant Guaranty is still absolved of liability since the liability (or lack thereof) of both defendants Fireman's Fund and Guaranty is based upon policy language which is essentially the same. In any event, there is no genuine issue of material fact as to whether defendant Guaranty has a duty to defend or indemnify the underlying discrimination actions.

In sum, on this record, there is no genuine issue of material fact as to whether defendant Guaranty had a duty to defend and indemnify plaintiff corporation. Accordingly, the 26 April 1993 order of the trial court granting defendant Guaranty's motion for summary judgment is affirmed.

Affirmed.

Panel consisting of:

Judges EAGLES, MARTIN, John C., and McGEE.

MARLOW v. N.C. EMPLOYMENT SECURITY COMM.

[127 N.C. App. 734 (1997)]

REBECCA L. MARLOW, PETITIONER-APPELLANT v. NORTH CAROLINA EMPLOYMENT
SECURITY COMMISSION, RESPONDENT-APPELLEE

No. COA96-1501

(Filed 18 November 1997)

**Labor and Employment § 152 (NCI4th)— sexual harassment—
good cause for leaving employment—right to unemployment
benefits**

An employee who left her employment because of sexual harassment by her immediate supervisor terminated her employment for good cause attributable to the employer and was not disqualified for unemployment benefits even though she failed to report the sexual harassment to upper management pursuant to the employer's grievance policy.

Appeal by petitioner from order entered 20 August 1996 by Judge Ronald E. Bogle in Catawba County Superior Court. Heard in the Court of Appeals 27 August 1997.

Catawba Valley Legal Services, Inc., by John Vail, for petitioner-appellant.

Employment Security Commission of North Carolina, by Chief Counsel Thelma M. Hill and Deputy Chief Counsel Henry Gransee, for respondent-appellee.

JOHN, Judge.

Petitioner appeals the trial court's order affirming decisions of the Employment Security Commission of North Carolina (the Commission) and the Appeals Referee denying her claim for unemployment benefits. We reverse the trial court.

The underlying facts are essentially uncontroverted and pertinent portions are set out in the findings of fact of the Appeals Referee as follows:

1. [Petitioner] worked for Carpenter Decorating Company
... as a machine operator. . . .

....

3. [She] left this job because her immediate supervisor made repeated sexual comments to her in the workplace over a period of several years up until [her termination]. [Petitioner] was

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offended and intimidated by the supervisor's behavior and told him to stop it, but he never did. . . .

4. The supervisor's behavior amounted to sexual harassment. . . .

5. [The] [e]mployer's policy, known to [petitioner] at the times in question, prohibited sexual harassment and required that it be reported to upper management if the harasser was the direct supervisor.

6. [Petitioner] never reported the sexual harassment to any management over the immediate supervisor because she thought that she would not be believed

The Appeals Referee further found that "[b]y failing to report the sexual harassment to upper management before leaving the job, [petitioner] denied employer the opportunity to solve the problem."

Based upon the foregoing findings, the Appeals Referee concluded petitioner's termination of employment was not for good cause attributable to her employer, and denied her claim for unemployment benefits. On 9 April 1996, the Commission affirmed and adopted as its own the decision of the Appeals Referee. Petitioner sought judicial review 24 April 1996 in Catawba County Superior Court, which affirmed the Commission 20 August 1996. Petitioner filed notice of appeal to this Court 16 September 1996.

Upon leaving her position at Carpenter Decorating Company (CDC), petitioner filed for unemployment benefits pursuant to the Employment Security Act (the Act), codified at N.C.G.S. § 96-1 *et seq.* (1995). The Act is to be liberally construed in favor of applicants. *Eason v. Gould, Inc.*, 66 N.C. App. 260, 263, 311 S.E.2d 372, 374 (1984), *aff'd*, 312 N.C. 618, 324 S.E.2d 223 (1985). Further, in keeping with the legislative policy to reduce the threat posed by unemployment to the "health, morals, and welfare of the people of this State," N.C.G.S. § 96-2 (1995), statutory provisions allowing disqualification from benefits must be strictly construed in favor of granting claims. *Barnes v. The Singer Co.*, 324 N.C. 213, 216, 376 S.E.2d 756, 758 (1989).

The statutory disqualification provision applicable to the case *sub judice* is N.C.G.S. § 96-14(1) (1995), which states, *inter alia*:

An individual shall be disqualified for benefits . . . if it is determined by the Commission that such individual is, at the time [his]

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claim is filed, unemployed because he left work without good cause attributable to the employer.

Petitioner has consistently maintained she terminated employment with CDC because of sexual harassment by her immediate supervisor, and, indeed, the Appeals Referee found as a fact that her “supervisor’s behavior amounted to sexual harassment of [petitioner].” Consequently, petitioner continues, she left for “good cause attributable to the employer” and was not, as a result, disqualified from receipt of unemployment benefits by G.S. § 96-14(1).

An employee who terminates employment for “good cause” leaves for a reason “that would be deemed by reasonable men and women as valid and not indicative of an unwillingness to work.” *Watson v. Employment Sec. Comm.*, 111 N.C. App. 410, 413, 432 S.E.2d 399, 401 (1993). It cannot be contested that sexual harassment in the workplace constitutes good cause under G.S. § 96-14(1) for leaving employment, and the Commission has advanced no argument to the contrary. *See Phelps v. Vassey*, 113 N.C. App. 132, 137, 437 S.E.2d 692, 695 (1993) (“[t]he public policy of North Carolina must be to stop sexual harassment in the work place”), and *In re Bolden*, 47 N.C. App. 468, 471, 267 S.E.2d 397, 399 (1980) (had claimant “left her job because of racial discrimination practiced against her by her employer, she would have had good cause attributable to her employer and so would not have been disqualified for benefits”); *see also Hoerner Boxes, Inc. v. Mississippi Employment Sec. Com’n*, 693 So.2d 1343, 1348 (Miss. 1997) (“sexual harassment in the work place constitutes good cause for voluntarily leaving employment in the context of unemployment compensation benefit claims”).

Moreover, the Commission, in asserting that the trial court ruled properly and in responding to petitioner’s argument to this Court, does not focus upon imputation to CDC of the supervisor’s actions in sexually harassing petitioner. *See Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1350-52 (1995) (where supervisor’s sexual misconduct occurred “in the workplace, during working hours, on an employee whom he had authority to hire, fire, promote, and discipline,” supervisor acted within scope of his employment such that employer is vicariously liable in action grounded on supervisor’s actions); *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 492, 340 S.E.2d 116, 122, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986) (“ ‘designation “manager” implies general power and permits a reasonable inference that he was vested with the general conduct and control of

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defendant's business . . . , and his acts are, when committed in the line of his duty and in the scope of his employment, those of the company' ") (quoting *Gillis v. Tea Co.*, 223 N.C. 470, 474, 27 S.E.2d 283, 285 (1943)).

Rather, the Commission, in arguing petitioner's termination of employment was not for good cause attributable to CDC, points in the main to findings of the Appeals Referee that CDC was never advised by petitioner of the supervisor's actions notwithstanding CDC's policy against sexual harassment, and that petitioner's "fail[ure] to report the sexual harassment to upper management before leaving the job . . . denied [CDC] the opportunity to solve the problem." Accordingly, the Commission asserts, the trial court properly affirmed the determination of the Appeals Referee that plaintiff's leaving employment at CDC was not attributable to her employer:

[T]he facts in this unemployment case do not show this employer was at fault since it had a policy prohibiting sexual harassment and did not know that the claimant had been sexually harassed since she did not follow the employer's reasonable policy that required reporting it to the "upper management."

The Commission's argument is unfounded.

An earlier decision of this Court, *In re Werner*, 44 N.C. App. 723, 725, 263 S.E.2d 4, 6 (1980), squarely resolved the question of whether an employee's failure to seek redress under the employer's grievance procedure rendered her departure without good cause attributable to the employer. In *Werner*, we affirmed the trial court's ruling that

as a matter of law, claimant's failure to use the grievance machinery did not render the separation voluntary or without good cause attributable to the employer.

Werner, 44 N.C. App. at 728, 263 S.E.2d at 7. In reaching this holding, we examined the legislative intent behind enactment of G.S. § 96-1 *et seq.*:

Although the General Assembly could have, by statute, disqualified all such employees who do not exhaust the employer's grievance machinery, it has not done so. The disqualifying provisions of G.S. 96-14 are to be construed strictly in favor of the claimant It therefore would not be consistent with the public policy of our State, as expressed in G.S. 96-2 or the opinions

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of our courts, to disqualify from benefit eligibility such employees for not availing themselves of the employer's grievance machinery.

Id. (citation omitted).

The holding of *Werner* is precisely on point with the facts herein: petitioner's mere failure to report sexual harassment pursuant to her employer's grievance policy did not, in itself, disqualify her from unemployment benefits eligibility. *See also In re Clark*, 47 N.C. App. 163, 167, 266 S.E.2d 854, 856 (1980) (citing *Werner* for holding that employee terminating employment for good cause attributable to employer is not, in order to preserve employee's claim for unemployment benefits, obligated to attempt resolution of the conflict prior to leaving). Petitioner's failure to report her supervisor's misconduct having been the basis for the Commission's denial of her unemployment benefits claim, the trial court erred in affirming the Commission. Construing the relevant disqualifying provisions strictly and in favor of granting petitioner's claim, *Barnes*, 324 N.C. at 216, 376 S.E.2d at 758, we hold that petitioner, under the circumstances *sub judice*, left employment with CDC for good cause attributable to her employer. *See Werner*, 44 N.C. App. at 728, 263 S.E.2d at 7, and *Clark*, 47 N.C. App. at 167, 266 S.E.2d at 856.

Based on the foregoing, the order of the trial court is reversed and this case remanded to that court for further remand to the Commission with instructions to ascertain the period of petitioner's entitlement to unemployment benefits and thereupon to award her the appropriate amount thereof.

Reversed and remanded.

Judges LEWIS and SMITH concur.

WOOTEN v. TOWN OF TOPSAIL BEACH

[127 N.C. App. 739 (1997)]

DAL FLOYD WOOTEN III, PLAINTIFF V. TOWN OF TOPSAIL BEACH, DEFENDANT

No. COA97-150

(Filed 18 November 1997)

1. Highways, Streets, and Roads § 12 (NCI4th)— dedicated street—park to be built at one end—properly enjoined

The trial court properly granted summary judgment for plaintiff in an action arising from the Town's attempt to construct a park at the end of a dedicated unpaved portion of a street which ran to Banks Channel. This land was dedicated as a street and cannot be used as a park; if a property is dedicated for a particular purpose, it cannot be diverted from that purpose by the state or municipality except by eminent domain. Additionally, defendant intends to block vehicular traffic, so that construction of a park is inconsistent with the dedication as a street.

2. Highways, Streets, and Roads § 12 (NCI4th)— park on one end of dedicated street—reversion of property to adjacent landowners

The trial court erred by enjoining defendant from constructing a park on the unused portion of a dedicated street until defendant complies with applicable statutes for closing a dedicated street. Closing the street pursuant to statute would not allow defendant to utilize the street for park purposes in that N.C.G.S. § 160A-299(c) specifies that the land would go to property owners on the sides of the dedicated street.

Appeal by defendant from: (1) grant of summary judgment in favor of plaintiff; (2) denial of defendant's summary judgment motion; and (3) grant of a permanent injunction against defendant, all entered 10 January 1997 by Judge Elton G. Tucker in Pender County District Court. Heard in the Court of Appeals 7 October 1997.

Clare Lynn Brock for plaintiff appellee.

Wessell & Raney, by John C. Wessell III, for defendant appellant.

SMITH, Judge.

Prior to March 1950, a map was recorded in the Pender County Register of Deeds showing a sixty-foot right of way designated as Scott Avenue running east to west from the Atlantic Ocean to the

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waters of Banks Channel, which dedication was accepted by the Town of Topsail Beach ("Town"). The majority of this public street is paved. However, the westernmost portion of Scott Avenue, approximately one hundred twenty feet in length and sixty feet wide, has never been paved. In the past, people have parked cars, boats, boat trailers, and other vehicles along the unpaved portion of the street. The street has also been used as access to the Banks Channel waterway. In addition, plaintiff uses Scott Avenue as a principal means of vehicular access to the western portion of a duplex facing Banks Channel.

On 9 April 1996, plaintiff Dal F. Wooten III, sought a preliminary and permanent injunction enjoining the Town from constructing proposed improvements at the western end of the dedicated unpaved portion of Scott Avenue. Prior to 26 March 1996, the Board of Commissioners of the Town directed the town manager to construct a park on the westernmost unpaved portion of Scott Avenue. Plaintiff's family has owned Lot 23 of the subdivision, shown on the recorded map, for approximately thirty-four years. This lot lies immediately north of the right of way of Scott Avenue within which the proposed improvements are to be made.

On 2 January 1997, District Court Judge Elton G. Tucker heard motions for summary judgment from both parties. Thereafter, Judge Tucker granted plaintiff's motion for summary judgment, while denying defendant's motion. Further, the judge permanently enjoined defendant from constructing a park unless and until the Town complies with N.C. Gen. Stat. § 160A-299 (1987) and other applicable statutes for the closing of a dedicated street. Defendant appeals from this judgment.

[1] The first assignment of error involves whether the trial court erred in granting summary judgment in favor of plaintiff on the grounds that the Town lacked the authority to make the proposed improvements. Appellate review of the grant of summary judgment is limited to two questions, including: (1) whether there is a genuine question of material fact, and (2) whether the moving party is entitled to judgment as a matter of law. *Gregorino v. Charlotte-Mecklenburg Hosp. Authority*, 121 N.C. App. 593, 595, 468 S.E.2d 432, 433 (1996). A motion for summary judgment should be granted if, and only if, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . ." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). Evidence is viewed in the light most favorable to the

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non-moving party with all reasonable inferences drawn in favor of the nonmovant. *Whitley v. Cubberly*, 24 N.C. App. 204, 206-07, 210 S.E.2d 289, 291 (1974).

Defendant argues the Town has the authority to construct a park on the dedicated street, Scott Avenue. However, “[i]f property is dedicated for a particular purpose, it cannot be diverted from that purpose by the state or municipality, except under the power of eminent domain.” McQuillin, *The Law of Municipal Corporations*, Third Edition, Volume 11A § 33.74. This principle means that

[w]here the owner of land has dedicated [the land] for a street or alley, the municipality cannot appropriate it to other uses or purposes. However, the land may be appropriated to any use, such as the construction of sewers, to which a street acquired in any other manner may be put. Permissible uses of a street may include the use of the street by a railroad, for the placing of telephone poles by a telephone company, and for part of a sea wall system. Land dedicated as a street may also be modernized to conform to modern plans for traffic flow and control. **Land dedicated for a street cannot be used, however, as a park or as a public square.**

Id. (footnotes omitted) (emphasis added). Since the land in this case was dedicated as a street, it cannot be used as a park.

In addition, the use made of dedicated property may constitute misuse or diversion if the use is inconsistent with the purposes of the dedication or substantially interfere with it. *March v. Town of Kill Devil Hills*, 125 N.C. App. 151, 154, 479 S.E.2d 252, 253 (1997). N.C. Gen. Stat. § 20-4.01(13) (Cum. Supp. 1996) defines a street as: “[t]he entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of **vehicular traffic**.” (Emphasis added.) Defendant intends to block vehicular traffic and, thus, the construction of a park is inconsistent with the dedication of land as a street. This proposed use of the dedicated street as a park constitutes misuse or diversion. Therefore, there is no genuine issue of material fact and plaintiff is entitled to judgment as a matter of law.

The second assignment of error is whether the trial court erred in denying defendant’s motion for summary judgment. However, appellate review is confined to those exceptions which pertain to the argu-

ment presented. *Crockett v. First Fed. Sav. & Loan Assoc. of Charlotte*, 289 N.C. 620, 632, 224 S.E.2d 580, 588 (1976). To obtain appellate review, a question raised by an assignment of error must be presented and argued in the brief. *In re Appeal from Environmental Management Comm.*, 80 N.C. App. 1, 18, 341 S.E.2d 588, 598, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 139 (1986). Questions raised by assignments of error which are not presented in a party's brief are deemed abandoned. *State v. Wilson*, 289 N.C. 531, 535, 223 S.E.2d 311, 313 (1976). Defendant failed to address the denial of his summary judgment motion. Therefore, this issue is deemed abandoned.

[2] Finally, defendant argues the trial court erred in permanently enjoining the Town from constructing a park until the Town complies with N.C. Gen. Stat. § 160A-299 and other applicable statutes for the closing of a dedicated street. N.C. Gen. Stat. § 160A-299(a) gives cities and towns the authority to close "any street or public alley." *In re Easement in Fairfield Park*, 90 N.C. App. 303, 309, 368 S.E.2d 639, 642 (1988). Furthermore, N.C. Gen. Stat. § 160A-299(d) states that this section shall apply to "any street or public alley within a city or its extraterritorial jurisdiction that has been irrevocably dedicated to the public, without regard to whether it has actually been opened." *Id.* In this case, defendant wants to close the dedicated street to vehicular traffic in order to construct a park. The Town has the authority to close the street in this manner, but they must follow the dictates of N.C. Gen. Stat. § 160A-299 in order to effectuate the closing of the street. Defendant has not followed the procedures set out in this section and, therefore, this assignment of error is overruled.

Finally, we note that the trial judge enjoined the Town from constructing a park until they closed the dedicated street in accordance with N.C. Gen. Stat. § 160A-299. However, closing the street pursuant to the statute would not allow the Town to utilize the street for park purposes in that N.C. Gen. Stat. § 160A-299(c) specifies if a portion of the street is closed, the land would go one-half each to property owners on the north and south sides of the dedicated street. Thus, the trial court erred in issuing an injunction "until the Town complies with North Carolina General Statute 160A-299 and any other applicable statute for the closing of a dedicated street."

In conclusion, there is no genuine issue of material fact and plaintiff is entitled to judgment as a matter of law. Accordingly, we affirm the trial court's grant of summary judgment for plaintiff, reverse the

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[127 N.C. App. 743 (1997)]

trial court's error in issuing its injunction until the street is closed, and remand for correction of the judgment.

Affirmed in part, reversed in part, and remanded for correction of judgment.

Judges WYNN and MARTIN, John C., concur.

THE AGNOFF FAMILY REVOCABLE TRUST, CHARLES AGNOFF, EVELYN AGNOFF, TRUSTEES, AND ROLF SASS, PLAINTIFFS v. LANDFALL ASSOCIATES, LANDFALL COUNCIL OF ASSOCIATIONS, INC., LANDFALL PROPERTY OWNERS ASSOCIATION, INC., VILLAS AT LANDFALL OWNERS ASSOCIATION, INC., DEFENDANTS

No. COA97-190

(Filed 18 November 1997)

Deeds § 57 (NCI4th)— restrictive covenant—pier connected to property

A pier built one foot from and not touching a property violates a restriction on that property prohibiting the placement of any pier "connected to" said property.

Appeal by plaintiffs The Agnoff Family Revocable Trust, Charles Agnoff, and Evelyn Agnoff, Trustees, from judgment dated 21 October 1996 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 8 October 1997.

Block, Crouch, Keeter & Huffman, by Franklin L. Block, for The Agnoff Family Revocable Trust, Charles Agnoff, Evelyn Agnoff, Trustees, plaintiffs appellants.

Murchison, Taylor, Kendrick & Gibson, L.L.P., by Michael Murchison, for defendants appellees.

GREENE, Judge.

The Agnoff Family Revocable Trust, through co-trustees Charles and Evelyn Agnoff (collectively, Agnoff), is the owner of a waterfront lot in Landfall Subdivision I, a residential community in New Hanover County, North Carolina. Agnoff appeals the trial court's entry of summary judgment for Landfall Associates, Landfall Council of

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Associations, Inc., Landfall Property Owners Association, Inc., and Villas at Landfall Owners Association, Inc. (collectively, Landfall).¹

The Agnoff property (Agnoff Property) is adjacent to lands owned by Landfall which abut navigable waters. The Agnoff Property was purchased subject to the following restrictive covenant (Covenant) contained in its deed from Landfall:

Docks, etc.: (a) No private docks, piers, moorings, boat houses, slips or similar structure may be erected on, placed on *or connected to* any lot, unless specifically authorized in the deed to said lot.

(Emphasis added.) Agnoff sought a declaratory judgment to determine whether a pier (extending from the Agnoff Property across the property of Landfall to navigable waters) built one foot beyond its property line would violate the Covenant. Both Agnoff and Landfall filed motions for summary judgment. The trial court held that the proposed pier did violate the Covenant and enjoined Agnoff from building a pier “on or adjacent to” the Agnoff Property.

The dispositive issue is whether a pier built one foot from and not touching a property is violative of a restriction on that property prohibiting the placement of any pier “connected to” said property.

“Provided that a restrictive covenant does not offend articulated considerations of public policy or concepts of substantive law, such provisions are legitimate tools which may be utilized by developers and other interested parties to guide the subsequent usage of property.” *Hobby & Son v. Family Homes*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981). In construing the language used in restrictive covenants, “each part . . . must be given effect according to the natural meaning of the words.” *Id.* A dictionary is an appropriate place to gather the natural meaning of words. *Angel v. Truitt*, 108 N.C. App. 679, 683, 424 S.E.2d 660, 663 (1993).

Agnoff contends that the one foot gap between the Agnoff Property and the proposed pier will prevent the pier from “connect[ing] to” the Agnoff Property and thus its construction would not violate the Covenant. We disagree.

Webster defines “connected” as “joined or linked together [or] logically related.” *Webster’s Third New International Dictionary*

1. Plaintiff Rolf Sass sold his Landfall property and is not a party to this appeal.

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480 (1966); *see also Black's Law Dictionary* 302 (6th ed. 1990) (defining "connected" as "[j]oined; united by junction, by an intervening substance or medium, by dependence or relation . . ."). A definition of "joined" is "[t]o adjoin." *The American Heritage Dictionary* 690 (2d ed. 1982). "Adjoin" is defined to mean "next to; be contiguous to." *Id.* at 79. "Contiguous" is defined to mean "[i]n close proximity." *Black's Law Dictionary* 320 (6th ed. 1990).

In this case, Agnoff proposed to build a pier located one foot from the Agnoff Property and extending into navigable water. This proposed pier, if constructed, would "adjoin" and be "in close proximity" to the Agnoff Property. Furthermore, the pier and the Agnoff Property are "logically related" in that Agnoff would have no right to build the pier into navigable waters absent his ownership of the property abutting the water. *See Gaither v. Hospital*, 235 N.C. 431, 444, 70 S.E.2d 680, 691 (1952) (littoral proprietors have a property right in the water frontage belonging to their land). Thus, the pier Agnoff seeks to construct would be "connected to" the Agnoff Property within the meaning of the Covenant and the trial court correctly entered summary judgment for Landfall.

Affirmed.

Judges JOHN and TIMMONS-GOODSON concur.

CAROLINA SPIRITS, INC., PLAINTIFF v. THE CITY OF RALEIGH, DEFENDANT

No. COA97-25

(Filed 18 November 1997)

Declaratory Judgment Actions § 8 (NCI4th)— 1977 ordinance—adult establishment—definition changed—1977 meaning moot

There was no real controversy between the parties and the trial court was without jurisdiction to adjudicate the issue presented where plaintiff owned and operated a nightclub which featured female impersonators and sought a declaratory judgment against enforcement of a 1977 ordinance prohibiting operation of one adult establishment within 1200 feet of another. The 1977 def-

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inition of "adult establishment" has been replaced and the meaning of "adult establishment" as defined by the 1977 ordinance is moot. The meaning of "adult establishment" in the context of the current statute was not before the appellate court.

Appeal by defendant from judgment dated 6 November 1996 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 17 September 1997.

Tharrington Smith, by Randall M. Roden and E. Hardy Lewis, for plaintiff appellee.

City Attorney Thomas A. McCormick, by Associate City Attorney Dorothy K. Woodward, for defendant appellant.

GREENE, Judge.

The City of Raleigh (City) appeals from a judgment (entered pursuant to a declaratory judgment complaint filed by Carolina Spirits, Inc. (plaintiff)) directing it not to enforce a provision of an ordinance adopted by the City in 1977 that prohibited the operation of an "adult establishment" within 1,200 feet of another adult establishment.

The plaintiff owns and operates a nightclub named "Legends" which features female impersonations. On 1 April 1996 the City issued a citation to the plaintiff alleging that the plaintiff was operating an "adult establishment" in violation of an ordinance of the City. On 8 April 1996, the plaintiff paid, under protest, a \$50.00 fine for the violation. On 20 May 1996 the plaintiff filed a request for a declaratory judgment.

The 1977 ordinance defines an "adult establishment" as "[a]ny place contained in N.C.G.S. § 14-202.10(b) including adult cabaret(s)." Raleigh, N.C. Ordinance 647 TC 71 (Nov. 1, 1977). This ordinance was amended several times after 1977 and at the time the complaint in this action was filed (and the citation issued) the definition of "adult establishment" had been changed to read as follows: "[a]dult cabarets, adult media centers, and any place contained in G.S. 14-202.10(b), excluding masseurs." Raleigh, N.C., Code § 10-2002 (1996). The plaintiff, however, based its request for the declaratory judgment on the definition of "adult establishment" as it read in the 1977 ordinance and the trial court declared the rights of the parties within the context of the 1977 definition of "adult establishment."

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The dispositive issue is whether, at the time the complaint was filed, there existed a real controversy between the parties with respect to the meaning of "adult establishment" within the context of the 1977 ordinance.

"[A]n action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute." *Adams v. Dept. of N.E.R.* and *Everett v. Dept. of N.E.R.*, 295 N.C. 683, 703, 249 S.E.2d 402, 413-4 (1978) (quoting *Lide v. Mears*, 231 N.C. 111, 118, 56 S.E.2d 404, 409, (1949). "[T]he sound principle that judicial resources should be focused on problems which are real and present rather than dissipated on abstract, hypothetical or remote questions is fully applicable to the Declaratory Judgment Act." *Adams*, 295 N.C. at 703, 249 S.E.2d at 414. A court, therefore, cannot construe a statute in a declaratory judgment action if the statute has been repealed and if an interpretation of that statute would be moot. 22A Am. Jur. 2d *Declaratory Judgments* § 88 (1988).

In this case, the plaintiff requested a declaration of its rights under the 1977 version of the ordinance defining "adult establishment" and the trial court's judgment declared the rights of the parties within the context of the 1977 ordinance. In fact, at the time the complaint was filed (and at the time the plaintiff was cited by the City for violation of the ordinance) the 1977 definition of "adult establishment" had been replaced by a similar yet different definition. Thus, at the time the complaint was filed there did not exist an actual or real controversy with respect to the meaning of "adult establishment" as defined in the 1977 version of the ordinance. The plaintiff was not at that time, nor could it be in the future, subject to regulation under an ordinance (or provision thereof) that was no longer valid. Simply put, the meaning of "adult establishment" as it was defined by the ordinance in 1977 is moot and the trial court, therefore, was without jurisdiction to adjudicate the issue presented.

We are aware that there may indeed be a present and real controversy between these parties with respect to the meaning of "adult establishment" in the context of the current statute but that issue is not before this Court. Not until the trial court declares the rights of the parties with respect to the new ordinance would that question be ripe for review in this Court. See *Harris v. Harris*, 307 N.C. 684, 690, 300 S.E.2d 369, 374 (1983).

KORTESIS v. MEDICAL PARK HOSPITAL, INC.

[127 N.C. App. 748 (1997)]

Vacated.

Judges JOHN and TIMMONS-GOODSON concur.

| | | |
|-----------------------------|---|-------|
| RICKE A. KORTESIS AND |) | |
| ANGELOS D. KORTESIS |) | |
| Plaintiffs |) | |
| |) | |
| v. |) | ORDER |
| |) | |
| MEDICAL PARK HOSPITAL INC. |) | |
| AND CAROLINA MEDICORP, INC. |) | |
| Defendants |) | |

No. COA97-393

(Filed 20 November 1997)

The following order was entered:

The motion filed in this cause on the 15th day of April 1997 entitled "Motion to Dismiss Appeals and Motion for Sanctions" is allowed. The Court determines that the appeal is from a clearly interlocutory order which does not affect a substantial right and that the appeal was taken for an improper purpose so as to cause unnecessary delay and needless increase in the cost of this litigation. The appeal is therefore dismissed.

Pursuant to Rule 34 of the Rules of Appellate Procedure the Court imposes sanctions as follows:

- (a) The appellant is taxed with the entire costs, to be doubled;
- (b) The appellant is taxed with the appellees' reasonable expenses, including attorney's fees, incurred in connection with the appeal.

This cause is hereby remanded to the Superior Court of Forsyth County for a hearing to determine the appellees' reasonable expenses, including attorney's fees, incurred in connection with this appeal and entry of an order setting forth the court's findings and directing payment of same. The cause is further remanded for trial. This order shall be published in the Court of Appeals Reports.

By order of the Court this the 20th day of November 1997.

KORTESIS v. MEDICAL PARK HOSPITAL, INC.

[127 N.C. App. 748 (1997)]

It is considered and adjudged that the APPELLANT DO PAY the costs of the appeal in this Court incurred, to wit the sum of FOUR-HUNDRED EIGHTY-FOUR AND 75/100 dollars (\$484.75), and execution issue therefor.

The above order is therefore certified to the Clerk of Superior Court Forsyth County.

Witness my hand and official seal this the 20th day of November 1997.

s. John H. Connell

John H. Connell

Clerk of North Carolina Court of Appeals

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 4 NOVEMBER 1997

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| BRAME v. SHARPE No. 97-100 | Mecklenburg (93CVD13666) | Affirmed in part, Reversed in part and Remanded |
| CROSS v. PRIDGEN No 96-1111 | Onslow (93CVS2543) | Appeal dismissed in part; summary judgment affirmed |
| CURASI v. BELLSOUTH ADVER. & PUB. CORP. No. 97-493 | Mecklenburg (93CVS12112) | Dismissed |
| DARDEN v. SOULES No. 96-1411 | Dare (95CVD626) | Affirmed in part; Reversed in part |
| DEANS v. GOLDSTON No. 97-126 | Durham (95CVS01212) | No Error |
| FISK v. KELLY SPRINGFIELD TIRE CO. No. 97-3 | Ind. Comm. (427040) | Affirmed |
| HARTWELL v. COUNTY OF DAVIDSON No. 97-374 | Davidson (95CVS950) | Dismissed |
| HUANG v. WANG No. 97-121 | Wake (95CVS1166) | Affirmed |
| IN RE FORECLOSURE OF McCAUSLAND No. 97-396 | Rutherford (96SP27) | Affirmed |
| IN RE HAGINS No. 97-60 | Johnston (94J28) (94J29) (94J30) | Affirmed |
| IN RE SMITH No. 97-511 | Hoke (92J35) (92J36) (92J37) | Affirmed |
| IN RE STONE No. 97-201 | Mecklenburg (96J213) | Affirmed |

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| MARSHALL v. SIZEMORE No. 96-1538 | Mecklenburg (94CVD8159) | Affirmed |
| MASSENGILL v. N.C. BD. DENTAL EXAMINERS No. 97-54 | Cumberland (95CVS870) | Affirmed |
| MITCHELL v. WEBB'S MAINTENANCE & PIPING No. 97-7 | Ind. Comm. (478826) | Affirmed |
| N.C. FARM BUREAU MUT. INS. CO. v. CALDWELL No. 97-384 | Dare (96CVS492) | Dismissed |
| PARKER v. BYRD REALTY CO. No. 97-152 | Johnston (95CVS02306) | Affirmed |
| PIERCE v. JOHNSON No. 97-101 | Guilford (95CVS8494) | Affirmed |
| SILVER v. STANDARD PRODUCT CO. No. 97-320 | Ind. Comm. (370521) | Affirmed |
| SMITH v. NATIONWIDE MUTUAL FIRE INS. CO. No. 97-155 | Wilkes (95CVS1879) | Affirmed |
| SMITH v. SOUTHERN PALLETT, INC. No. 97-358 | Ind. Comm. (390895) | Affirmed |
| STATE v. BENNETT No. 97-373 | Forsyth (96CRS11242) | No error in trial; Remanded for resentencing |
| STATE v. BERGMAN No. 97-27 | Henderson (92CRS7518) (92CRS7519) | Affirmed |
| STATE v. BOWDEN No. 97-475 | Lenoir (95CRS9964) | No Error |
| STATE v. BYERS No. 97-92 | Guilford (96CRS38128) | No Error |
| STATE v. CANTRELL No. 97-380 | Guilford (96CRS10310) (96CRS10311) | No Error |
| STATE v. CARSON No. 97-327 | New Hanover (95CRS29763) | No Error |

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| STATE v. CHEEK No. 97-237 | Guilford (95CRS74881) | No Error |
| STATE v. DANIELS No. 97-303 | Dare (96CRS1809) | No Error |
| STATE v. DARROW No. 96-1177 | Currituck (95CRS1047) | Dismissed |
| STATE v. DAUGHTRY No. 97-268 | Wake (96CRS46519) (96CRS46520) | No Error |
| STATE v. EDWARDS No. 97-403 | Lincoln (93CRS6325) (93CRS6326) | No Error |
| STATE v. GILBERT No. 97-65 | Wake (94CRS37719) | No Error |
| STATE v. HUNT No. 97-458 | Wake (96CRS9333) | No Error |
| STATE v. KEARNEY No. 97-376 | Mecklenburg (96CRS22593) (96CRS22595) | No Error |
| STATE v. MOORE No. 97-401 | Cleveland (94CRS10931) | No Error |
| STATE v. PLEASANTS No. 97-40 | Wake (95CRS71808) (95CRS71809) | No Error |
| STATE v. PUGH No. 97-246 | Bertie (96CRS1929) (96CRS1930) (96CRS2648) | Remanded for resentencing |
| STATE v. ROBINSON No. 97-287 | Halifax (94CRS2947) | No Error |
| STATE v. SIMMONS No. 97-427 | Wake (95CRS42724) | No Error |
| STATE v. TAYLOR No. 97-289 | Wake (96CRS47076) | No Error |
| STATE v. VALIQUETTE No. 97-397 | Mecklenburg (96CRS1608) | No Error |
| STATE v. WEBSTER No. 97-280 | Forsyth (95CRS46247) | Dismissed |
| STATE v. WILLIAMS No. 97-57 | Wake (94CRS80184) (94CRS20424) | No Error |

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| TAYLOR v. WEAVEXX, INC. No. 96-1495 | Wake (95CVS12678) | Affirmed |
| TURNER v. GREENE No. 97-516 | Rutherford (95CVS314) | Affirmed |

FILED 18 NOVEMBER 1997

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| AKINS v. CITY OF THOMASVILLE No. 97-42 | Davidson (95CVS1977) | Affirmed in part and Vacated in part |
| BEAR DEN ACRES DEVELOPMENT v. EBLING FAMILY TRUST No. 97-63 | McDowell (94CVD559) (94CVD422) | Affirmed in part, Reversed in part and Dismissed as moot in part |
| CLARK v. THOMASVILLE FURNITURE INDUS. No. 96-1477 | Ind. Comm. (250299) | Affirmed |
| COUNTY OF YADKIN v. MILLER No. 97-105 | Yadkin (95CVS504) | Affirmed |
| CULBERSON v. CULBERSON No. 96-1520 | Durham (96CVD02743) | Affirmed |
| DIGBY v. DIGBY No. 96-1108 | Guilford (95CVD7128) | Affirmed in part, Reversed in part, and Remanded |
| FLOYD AND SONS, INC. v. CAPE FEAR FARM CREDIT No. 96-708 | Robeson (92CVS02625) | Affirmed |
| FORTUNE v. BELL SOUTH CAROLINAS PCS No. 96-1521 | Buncombe (96CVS3166) | Reversed and Remanded |
| GANT v. DUCKWORTH ELECTRIC CO. No. 96-1535 | Ind. Comm. (134182) | Affirmed |
| GLICKMAN v. COMPUTER INTELLIGENCE, INC. No. 96-1432 | Wake (95CVS02274) | Affirmed |
| HALE v. AFRO-AMERICAN ARTS INT'L No. 92-475 | Guilford (89CVS04738) | Affirmed |

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| HARGROVE v. HARGROVE No. 97-677 | Vance (96CVD252) | Dismissed |
| HILL v. BI-COASTAL PAYROLL SERVICE No. 96-1445 | Ind. Comm. (277190) | Affirmed |
| IN RE BURGESS No. 97-349 | Rowan (94J145) (94J146) (94J147) (94J148) | Affirmed |
| IN RE GOODING No. 97-752 | Greene (95J9) | Affirmed |
| IN RE HARMON No. 97-515 | Buncombe (96J184) | Affirmed |
| IN RE REYNOLDS No. 97-318 | Wilson (95E367) | Reversed and Remanded |
| IN RE WALSER No. 97-572 | Forsyth (94J075) (94J076) | Affirmed |
| INGRAM v. KERR No. 97-97 | Wake (94CVS01082) | Affirmed |
| JACKSON v. PONDER No. 97-119 | Buncombe (95CVD4169) | Affirmed |
| JUST-IN-TIME KNITTING v. CADILLAC SHOE PRODUCTS No. 97-130 | Cabarrus (94CVS623) | Reversed and Remanded |
| LYNCH v. CARTER No. 97-316 | Halifax (95CVD814) | Affirmed in part; Appeal dismissed in part |
| OVERCASH v. KOON No. 97-181 | Gaston (95CVS876) | No Error |
| PATRICK v. CHACE PRECISION METAL No. 97-124 | Ind. Comm. (241515) | Affirmed in part, Reversed in part, and Remanded |
| PEARSALL v. HAMLET, H.M.A. No. 97-229 | Mecklenburg (94CVS10498) | Affirmed |
| SHARP v. BAKER No. 97-188 | Dare (96CVS355) | Affirmed |

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| STATE v. ANDERSON No. 97-290 | Lenoir (95CR3217) (95CR3218) | No Error |
| STATE v. BROWN No. 97-573 | Edgecombe (96CRS11418) | No Error |
| STATE v. BUNCH No. 97-580 | Pitt (96CRS11829) | Appeal Dismissed |
| STATE v. COBB No. 97-506 | Lenoir (96CRS4361) (96CRS4362) | No Error |
| STATE v. CREEF No. 97-386 | Dare (94CRS3388) | Dismissed |
| STATE v. DULIN No. 97-473 | Mecklenburg (96CRS6421) | No Error |
| STATE v. DUMMIT No. 97-68 | Forsyth (95IFS12592) | No Error |
| STATE v. GALLO No. 97-641 | New Hanover (95CRS21394) | Reversed |
| STATE v. GOINS No. 97-525 | Randolph (95CRS12547) (95CRS12548) (95CRS12549) (95CRS12550) (95CRS12551) | No Error |
| STATE v. HALL No. 96-1523 | Bladen (94CRS3891) (94CRS3892) (94CRS3893) | Defendant's motion for appropriate relief is dismissed without prejudice to file the same in the trial court. |
| STATE v. HARDRICK No. 97-37 | Mecklenburg (96CRS61156) (96CRS61157) (96CRS61165) | No Error |
| STATE v. HARRIS No. 97-578 | Warren (96CRS2499) (96CRS2500) | Affirmed and remanded with instructions |
| STATE v. HAYES No. 97-577 | Guilford (95CRS56306) (95CRS59184) | No Error |

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| STATE v. JOHNSON No. 97-593 | Mecklenburg (95CRS94183) (95CRS94184) (95CRS94185) | No Error |
| STATE v. LATTIMORE No. 97-651 | Catawba (94CRS1317) (94CRS1318) (94CRS1319) (94CRS1320) (94CRS1321) (94CRS1322) (94CRS1323) (94CRS1324) | No Error |
| STATE v. LONG No. 97-294 | Lenoir (95CRS9086) (95CRS9086A) | New Trial |
| STATE v. MCKINNEY No. 97-618 | Guilford (96CRS961) (96CVS962) (96CVS963) (96CVS964) | No Error |
| STATE v. MCKINNON No. 97-655 | Hoke (95CRS2367) (95CRS2368) (95CRS2829) | No Error |
| STATE v. MCKISSICK No. 97-640 | Lincoln (95CRS5361) (95CRS5362) | No Error |
| STATE v. MELENDEZ No. 97-536 | Orange (94CRS12612) (94CRS12613) | No Error |
| STATE v. MOORE No. 97-549 | Washington (96CRS1375) (96CRS1376) | No Error |
| STATE v. PATTERSON No. 97-598 | Macon (96CRS1077) | No Error |
| STATE v. PATTERSON No. 96-1476 | Mecklenburg (95CRS28557) | Affirmed |
| STATE v. PEARSON No. 97-563 | Burke (96CRS265) | No Error |
| STATE v. RHYNE No. 97-723 | Gaston (93CRS29222) (93CRS29223) (93CRS29224) | Affirmed |

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| | (93CRS29225) | |
| | (93CRS29226) | |
| | (93CRS29227) | |
| | (93CRS29228) | |
| | (93CRS29229) | |
| | (94CRS2089) | |
| | (94CRS2159) | |
| | (94CRS2160) | |
| | (94CRS2161) | |
| | (94CRS2162) | |
| STATE v. SHORTER No. 97-557 | Wake (94CRS59783) (94CRS59784) (94CRS88277) | Affirmed |
| STATE v. SOLOMAN No. 97-748 | Edgecombe (96CRS13719) (96CRS13720) | No Error |
| STATE v. STARKIE No. 97-333 | Pitt (96CRS9325) | No Error |
| STATE v. STURDIVANT No. 97-486 | Rowan (94CRS11774) | No Error |
| STATE v. TIRALONGO No. 97-203 | Onslow (95CRS22067) | Remanded for resentencing |
| STATE v. WARD No. 97-489 | Wilson (96CRS2053) (96CRS2054) (96CRS2055) (96CRS2056) | No Error |
| STATE v. WHITE No. 97-587 | Harnett (96CRS12488) (96CRS12489) | No Error |
| STATE v. WILLIS No. 97-416 | Forsyth (96CRS8072) | No Error |
| STATE v. WILSON No. 96-1541 | Wake (94CRS55477) (94CRS54835) (94CRS63095) | No Error |
| STUTTS v. TEAGUE No. 96-1226 | Alamance (94CVD1537) | Affirmed in part, Reversed in part and Remanded |

WADE v. DUKE UNIVERSITY
No. 96-825

Ind. Comm.
(044357)

Affirmed

WHITAKER v. HARRIS
No. 97-571

Edgecombe
(95CVS1295)

Affirmed
in part;
Reversed in
part; and
Remanded

APPENDIX

**ORDER ADOPTING AMENDMENT TO
THE CODE OF JUDICIAL CONDUCT**

**ORDER ADOPTING
AMENDMENT TO THE CODE OF JUDICIAL CONDUCT**

The Code of Judicial Conduct first published in 283 N.C. at 779-80, as amended from time to time thereafter, most recently on 25 May 1997 and published at 346 N.C. 806, is hereby amended by the addition of a new subsection (5) to read as follows:

7A. Political conduct in general.

(5) The foregoing provisions of Canon 7A do not prohibit candidates for judicial office from conducting a joint campaign, soliciting support for, endorsing or financially contributing to other judicial candidates.

This amendment shall be promulgated by publication in the advance sheets of the Supreme Court and the Court of Appeals and by distribution by mail to each superior court judge in the State. It shall be effective from the date this order is signed.

Adopted by the Court in Conference this 17th day of February, 1998.

s/Orr, J. _____
Orr, J.
For the Court

ANALYTICAL INDEX



WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

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| ADMINISTRATIVE LAW AND PROCEDURE | INFANTS OR MINORS |
| ADOPTION OR PLACEMENT FOR ADOPTION | INSURANCE |
| ADVERSE POSSESSION | INTENTIONAL MENTAL DISTRESS |
| APPEAL AND ERROR | INTOXICATING LIQUOR |
| ARBITRATION AND AWARD | |
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| AUTOMOBILES AND OTHER VEHICLES | JUDGMENTS |
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| BURGLARY AND UNLAWFUL BREAKINGS | KIDNAPPING |
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| CARRIERS | LABOR AND EMPLOYMENT LIENS |
| COLLEGES AND UNIVERSITIES | |
| CONSTITUTIONAL LAW | MORTGAGES AND DEEDS OF TRUST |
| COSTS | MUNICIPAL CORPORATIONS |
| COUNTIES | |
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| DAMAGES | OBSCENITY, PORNOGRAPHY, INDECENCY, OR PROFANITY |
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| EVIDENCE AND WITNESSES | |
| | QUIETING TITLE |
| FALSE PRETENSES, CHEATS, AND RELATED OFFENSES | |
| FISH AND FISHERIES | RAPE AND ALLIED SEXUAL OFFENSES |
| FRAUD, DECEIT, AND MISREPRESENTATION | RECORDS OF INSTRUMENTS, DOCUMENTS, OR THINGS |
| | RETIREMENT |
| HIGHWAYS, STREETS, AND ROADS | ROBBERY |
| HOMICIDE | |

SHERIFFS, POLICE, AND OTHER
LAW ENFORCEMENT OFFICERS
STATE

TAXATION

TRIAL

TRUSTS AND TRUSTEES

UNFAIR COMPETITION OR TRADE
PRACTICES

WORKERS' COMPENSATION

ZONING

ACCORD AND SATISFACTION

§ 8 (NCI4th). Agreements constituting accord and satisfaction; checks given as payment in full or as agreed settlement

Plaintiff university medical librarian's acceptance and cashing of a check from defendant university pursuant to an arbitration award in a dispute concerning her termination by the university constituted an accord and satisfaction although the check did not contain the words "payment in full." **Futrelle v. Duke University**, 244.

ACCOUNTANTS

§ 19 (NCI4th). Negligence generally; negligent rendering of services

Plaintiff trust beneficiaries could not recover against defendant accountants for breach of fiduciary duty in failing to properly advise plaintiffs of a known impending tax assessment against the trust where plaintiffs' evidence failed to prove the second element of constructive fraud by showing how this nondisclosure was tied to the consummation of any transaction. **Estate of Smith v. Underwood**, 1.

The evidence supported the jury's verdict finding that defendant CPA and defendant accounting firm breached their duty of care to a corporation formed by plaintiff trust beneficiaries by failing to file, cause to be filed, or verify the filing of an IRS subchapter S election form with the result that the corporation was treated as a C corporation and required to pay additional taxes. **Ibid.**

ADMINISTRATIVE LAW AND PROCEDURE

§ 55 (NCI4th). Who are "aggrieved" persons entitled to judicial review; injury required

Plaintiffs who were denied permits by the Marine Fisheries Division to harvest shellfish mechanically in a tract of submerged land for which they have a shellfish franchise were "aggrieved parties" who could initiate a "contested case" with the OAH. **Bryant v. Hogarth**, 79.

§ 57 (NCI4th). What is a decision or final decision subject to judicial review

The trial court erred by dismissing respondent's petition for judicial review for failure to exhaust his administrative remedies where petitioner did not file any written exceptions or arguments to the agency's final decision; while the parties are given the opportunity to file written exceptions or arguments, this does not create an additional exhaustion hurdle. **Jackson v. Dept. of Administration**, 434.

§ 60 (NCI4th). Judicial review under other statutes or rules

The task of a court reviewing a decision made by a town board sitting as a quasi judicial body includes reviewing the record for errors in law, insuring that procedures specified by law and statute and ordinance are followed, insuring that appropriate due process rights are protected, insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and insuring that decisions are not arbitrary and capricious. **Tate Terrace Realty Investors, Inc. v. Currituck County**, 212.

§ 65 (NCI4th). Procedure on review; scope and effect of review generally

The superior court erred by finding that the Coastal Resources Commission heard new evidence in violation of G.S. 150B-51(a) in an action arising from a proposed development on Ocracoke Island. **Everhart & Assoc. v. Dept. of E.H.N.R.**, 693.

ADMINISTRATIVE LAW AND PROCEDURE—Continued**§ 67 (NCI4th). Procedure on review; applicability of “whole record test”**

Judicial review of whether an agency's decision was arbitrary or capricious requires a “whole record” review. *Dew v. State ex rel. N.C. Dept. of Motor Vehicles*, 309.

ADOPTION OR PLACEMENT FOR ADOPTION**§ 30 (NCI4th). Illegitimacy of child; putative father's right to consent**

A father's consent to the adoption of his illegitimate daughter violated G.S. 48-37 and was void as contrary to public policy where consent was given in exchange for the termination of his child support obligations and the mother's agreement not to pursue either prospective or past child support; the consent agreement thus could not be used to estop the county DSS from seeking reimbursement for public assistance provided for the child subsequent to the consent order. *Stanly County DSS ex rel. Dennis v. Reeder*, 723.

§ 51 (NCI4th). Legal effect of final order of adoption; relief of biological parents from rights and duties

A father's consent to the adoption of his illegitimate daughter did not terminate his parental rights and obligations, which would be terminated only by the final order of adoption. *Stanly County DSS ex rel. Dennis v. Reeder*, 723.

ADVERSE POSSESSION**§ 1 (NCI4th). Actual, open, hostile, and continuous possession**

There was no error in the trial court's conclusion that a couple who resided on the property in question acquired title to the property by adverse possession. *Chicago Title Ins. Co. v. Wetherington*, 457.

APPEAL AND ERROR**§ 89 (NCI4th). Interlocutory orders; what constitutes order affecting substantial right generally**

An appeal from the trial court's grant of defendant's motion in limine was interlocutory, but was treated in the Court of Appeals' discretion as a petition for writ of certiorari. *Barrett v. Hyldburg*, 95.

§ 91 (NCI4th). Judgments involving multiple claims or parties generally

The trial court's order granting summary judgment on cross-claims in an action involving a lease termination failed to resolve all issues between all parties and was not a final judgment despite the trial court's certification. *Town Center Assoc. v. Y & C Corp.*, 381.

§ 111 (NCI4th). Appealability of particular orders; orders denying motion to dismiss generally

The trial court's denial of a motion to dismiss claims against a deputy sheriff in his individual capacity on the basis of public officer immunity was immediately appealable. *Trantham v. Lane*, 304.

The denial of defendant town's motion to dismiss a child's personal injury claim on the ground of sovereign immunity was immediately appealable. *Anderson v. Town of Andrews*, 599.

APPEAL AND ERROR—Continued

§ 114 (NCI4th). Appealability of particular orders; orders denying motion to dismiss based on failure to state claim

The denial of defendant town's motion to dismiss a father's claim for negligent infliction of emotional distress for failure to state a claim was not immediately appealable. **Anderson v. Town of Andrews**, 599.

§ 118 (NCI4th). Appealability of particular orders; summary judgment denied

In an action arising from the termination of a lease, an appeal from the denial of a motion for summary judgment was interlocutory. **Town Center Assoc. v. Y & C Corp.**, 381.

§ 119 (NCI4th). Appealability of particular orders; summary judgment granted

In an action arising from the termination of a lease, an appeal from the granting of summary judgment on counterclaims was interlocutory because it failed to resolve all of the issues between the parties and thus was not a final judgment. **Town Center Assoc. v. Y & C Corp.**, 381.

§ 122 (NCI4th). Appealability of particular orders; danger of inconsistent verdicts

A summary judgment in favor of one of several defendants in an action arising from the flooding of plaintiff's property was appealable where plaintiff had alleged that the flooding was the direct and proximate result of the joint acts of negligence of all the defendants. **Biggers v. John Hancock Mut. Life Ins. Co.**, 199.

§ 124 (NCI4th). Appealability of particular orders; arbitration

An interlocutory order denying defendants' motion to confirm an arbitration award and to dismiss plaintiff's action for breach of contract, wrongful discharge, and defamation involved a substantial right and was immediately appealable. **Futrelle v. Duke University**, 244.

§ 129 (NCI4th). Appealability of particular orders; orders relating to default judgments

An appeal from a default judgment would have been interlocutory where the trial court also ordered that the matter be set for trial on damages. **Harlow v. Voyager Communications V**, 623.

§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection, or motion

Defendant's contention in a second-degree kidnapping prosecution that the trial court erred in deferring judgment on his motion in limine was not addressed on appeal where defendant did not object at trial. **State v. Williams**, 464.

§ 206 (NCI4th). Appeal in civil actions; time for appeal; tolling of time

Respondent's time for filing a notice of appeal from an order terminating her parental rights was not tolled by respondent's filing of a Rule 60 motion seeking relief from the trial court's order on the basis of excusable neglect. **Mitchell County DSS v. Carpenter**, 353.

APPEAL AND ERROR—Continued**§ 212 (NCI4th). Appeal in criminal actions; notice of appeal, generally; time for appeal**

The trial court exceeded its authority by entering an order extending the time for taking an appeal. **State v. White**, 565.

§ 233 (NCI4th). Appeal from magistrate or district court; appeal by the State

The State's notice of appeal to superior court from the dismissal in district court of criminal charges relating to a pyramid scheme was sufficient to vest the superior court with jurisdiction even though defendants contended that the superior court lacked jurisdiction because the State filed a notice of appeal instead of the statutorily required motion. **State v. Ward**, 115.

§ 281 (NCI4th). Trial de novo on appeal generally

An order of the superior court was reversed and remanded for a de novo review and proper evidentiary hearing of the district court's decision dismissing the charges against defendants where it was evident from the record that the superior court misapprehended the nature of its review on appeal and failed to hold the necessary hearing for de novo review. **State v. Ward**, 115.

§ 342 (NCI4th). Cross-assignments of error by appellee

Defendant's cross-appeal from the failure of the trial court to grant his motion for summary judgment in an action for civil assault and emotional distress based upon recovered memories was dismissed where he assigned as error neither an action nor an omission of the trial court which deprived him of an alternative basis for supporting the order from which plaintiff appealed. **Barrett v. Hyldburg**, 95.

§ 364 (NCI4th). Omission of necessary part of record generally

The appellate court will not consider plaintiff father's contention that the trial court erred by finding him in contempt for failing to comply with a court order where the order was not included in the record on appeal. **Sharpe v. Nobles**, 705.

§ 372 (NCI4th). Settling record on appeal; extension of time

Appeals were dismissed where the settled record was served beyond the time allowed by the Rules of Appellate Procedure and an extension of time had been granted by the trial court rather than the Court of Appeals. **Onslow County v. Moore**, 546.

§ 419 (NCI4th). Error not contained in record, but argued in brief, generally

Where no assignment of error corresponds to the issue of preemption, that issue was not properly before the appellate court. **Maynor v. Onslow County**, 102.

§ 422 (NCI4th). Appellee's brief; presentation of additional questions

Petitioner appellee's discussion of issues not in respondent-appellant's brief without reserving those issues by cross-assignment of error and the violation of type size restrictions resulted in the imposition of double costs. **Tate Terrace Realty Investors, Inc. v. Currituck County**, 212.

§ 426 (NCI4th). Brief on appeal; page limitations

Petitioner-appellee's violation of type size restrictions imposed on briefs submitted to the Court of Appeals and its discussion of issues not in respondent-appellant's brief without preserving those issues by cross-assignment of error resulted in the imposition of double costs. **Tate Terrace Realty Investors, Inc. v. Currituck County**, 212.

§ 443 (NCI4th). Review on assignments of error in record

An assignment of error was inadequate, but was addressed in the interest of justice, where it encompassed multitudinous areas of law and failed to apprise the Court of Appeals of the legal basis upon which it rested. **State v. Ward**, 115.

§ 446 (NCI4th). Scope and nature of review on appeal; review under theory of trial

A superior court sitting as an appellate court may not consider a matter not addressed by the Board of Commissioners and the Court of Appeals in its derivative appellate jurisdiction may not consider matters not raised below. **Tate Terrace Realty Investors, Inc. v. Currituck County**, 212.

ARBITRATION AND AWARD

§ 33 (NCI4th). Award generally

Plaintiff ratified an arbitration award when she accepted and cashed defendant's check paid pursuant to the award. **Futrelle v. Duke University**, 244.

§ 36 (NCI4th). Conclusiveness of award generally

Plaintiff university medical librarian's acceptance and cashing of defendant university's check constituted an accord and satisfaction and ratification of an arbitration award pertaining to a dispute as to whether she was wrongfully terminated by defendant university which waived any right to bring future claims arising out of or related to the termination, and the trial court should have dismissed claims for breach of contract, wrongful discharge, and defamation which were directly related to her termination. **Futrelle v. Duke University**, 244.

ATTORNEYS AT LAW

§ 45 (NCI4th). Professional malpractice; applicable standard of care

In an action to recover for breach of fiduciary duty by defendant trustee-attorney, the trial court did not err by refusing to instruct the jury with respect to the higher standard of care applicable to one who holds himself out as a tax specialist as opposed to that applicable to a general practitioner where there was no evidence that the expertise of tax specialist was required to perform services undertaken by defendant. **Estate of Smith v. Underwood**, 1.

§ 51 (NCI4th). Fraud; liability under statute; damages

The trial court did not err in awarding double damages under G.S. 84-13 in plaintiff trust beneficiaries' action against defendant trustee-attorney to recover commissions not approved by the clerk of court where the trial court found that defendant committed constructive fraud. **Estate of Smith v. Underwood**, 1.

§ 62 (NCI4th). Fee as affected by discharge of attorney

An attorney who, before being discharged, performed significant services for clients in a contingent fee relationship in a personal injury action may recover quantum meruit attorney fees from the settling attorney by a motion in the cause. **Pryor v. Merten**, 483.

A discharged attorney's quantum meruit claim to recover a portion of the contingent fee received by the settling attorney in a personal injury action was not barred by laches where the discharged attorney filed his claim only weeks after the settlement and only one week after he learned of the settlement. **Ibid**.

AUTOMOBILES AND OTHER VEHICLES**§ 172 (NCI4th). Dealers and manufacturers; grounds for denial, revocation, or suspension of license**

The felony of conspiracy to possess with intent to distribute marijuana is a crime involving moral turpitude within the meaning of the statute permitting the Department of Motor Vehicles to revoke a motor vehicle dealer's license or a motor vehicle salesman's license upon the licensee's conviction of a felony involving moral turpitude. **Dew v. State ex rel. N.C. Dept. of Motor Vehicles**, 309.

§ 445 (NCI4th). Liability of particular persons; respondeat superior; independent contractor

The trial court did not err by granting summary judgment for a sand pit operator and carrier on respondeat superior for a collision between an independent contract carrier and plaintiff's vehicle. **Gordon v. Garner**, 649.

§ 538 (NCI4th). Loading vehicle generally

The trial court properly granted summary judgment in favor of a sand pit operator on the issue of whether it was independently negligent in a collision between a dump truck and plaintiff by allowing the truck driver to leave the company pits with an overloaded truck. **Gordon v. Garner**, 649.

§ 691 (NCI4th). Res ipsa loquitur

The trial court did not err by granting defendant's motion for a judgment n.o.v. in an action arising from an injury sustained when plaintiff was struck by an automobile as it was being driven from an auction building where the evidence did not support a conclusion that defendant failed to keep a proper lookout or that the vehicle was traveling at excessive speed, there was no evidence that defendant moved from a designated lane of travel, and res ipsa loquitur did not apply. **Asfar v. Charlotte Auto Auction, Inc.**, 502.

§ 834 (NCI4th). Driving under influence of impairing substance; warrantless arrest; effect of probable cause

The trial court properly concluded that there was probable cause to arrest defendant for impaired driving and driving while license revoked. **State v. Thomas**, 431.

§ 845 (NCI4th). Driving under influence of impairing substance; proof of impaired condition of driver

The State presented sufficient evidence that defendant was appreciably impaired to support his conviction of DWI under G.S. 20-138.1(a)(1). **State v. Phillips**, 391.

A breathalyzer test performed on defendant was not invalid because the instrument used for the test was calibrated by using a .10 rather than a .08 stock solution, and a reading of .09 constituted reliable evidence sufficient to support defendant's DWI conviction under G.S. 20-138.1(a)(2). **Ibid.**

§ 849 (NCI4th). Driving under influence of impairing substance; proof of highway and public vehicular area

The State sufficiently proved that the offense was committed on a public highway where the record revealed that the arresting officer testified that defendant committed the offense on Highway 70. **State v. Phillips**, 391.

BURGLARY AND UNLAWFUL BREAKINGS**§ 75 (NCI4th). Sufficiency of evidence; intent to commit felony**

The trial court properly denied defendant's motion to dismiss a charge of first-degree burglary for insufficient evidence of felonious intent. **State v. Wright**, 592.

CARRIERS**§ 1 (NCI4th). Definitions and distinctions generally**

Defendant G.S. Materials could not be held vicariously liable for the actions of a dump truck driver because G.S. Materials buys and sells sand to its customers, has no dump trucks or other transportation vehicles, and is not a common or a contract carrier. **Gordon v. Garner**, 649.

§ 17 (NCI4th). Exemptions generally

Defendant Aggregate Carriers was not subject to liability under any of the statutes or regulations set forth in Chapter 62 because sand is always exempted from Chapter 62 regardless of the purpose of such transportation. Only ready-mixed paving materials must be used in street or highway construction or repair to qualify for the exemption. **Gordon v. Garner**, 649.

§ 31 (NCI4th). Relationship between federal and state laws generally

Defendant Aggregate Carriers is not subject to liability for a traffic accident under federal statutes regarding the commercial dump truck industry because those rules and regulations apply only to carriers transporting persons or property in interstate commerce. **Gordon v. Garner**, 649.

COLLEGES AND UNIVERSITIES**§ 29 (NCI4th). Resident status for tuition purposes**

Decisions by the University of North Carolina State Residence Committee denying applications for state residency for tuition purposes were supported by substantial evidence in the whole record. **Norman v. Cameron**, 44.

Petitioners' state and federal constitutional rights to procedural due process were not violated in the denial of their applications for state residency for tuition purposes. **Ibid.**

CONSTITUTIONAL LAW**§ 49 (NCI4th). Standing to challenge constitutionality of statutes generally; requirement of direct injury**

The manager of an adult business did not have standing to argue that the definition of adult business in a county ordinance regulating the location of adult businesses was unconstitutionally vague where she acknowledged that the ordinance applied to her business. **Maynor v. Onslow County**, 102.

§ 64 (NCI4th). Police power; regulation for general welfare

A county ordinance regulating the location of adult and sexually oriented businesses was not unconstitutionally overbroad. **Maynor v. Onslow County**, 102.

§ 86 (NCI4th). State and federal aspects of discrimination

It was presumed that plaintiff was suing the named defendants under 42 U.S.C. § 1983 in their official capacity where the complaint does not identify whether they

CONSTITUTIONAL LAW—Continued

were being sued in their individual or official capacities, but the caption of the complaint and the allegations made therein refer to defendants by both their names and job titles. **Lorbacher v. Housing Authority of the City of Raleigh**, 663.

Summary judgment was properly granted for defendant Housing Authority on a claim under 42 U.S.C. § 1983 for deprivation of free speech arising from plaintiff's firing from the Housing Authority where plaintiff neither alleged nor brought forth any evidence that the Housing Authority has a policy or practice of discharging employees for the exercise of First Amendment rights. **Ibid.**

§ 98 (NCI4th). State and federal aspects of due process

Plaintiff's discharge from the Housing Authority did not warrant a direct claim under the North Carolina Constitution for violation of freedom of speech because his rights are adequately protected by a wrongful discharge claim. **Lorbacher v. Housing Authority of the City of Raleigh**, 663.

§ 105 (NCI4th). Property rights or interests protected by due process

The trial court properly dismissed plaintiff's Fourteenth Amendment Due Process claim arising from his dismissal from the Housing Authority where he did not allege a liberty interest, failed to allege that he is covered by a statute or ordinance creating an entitlement to continued employment, and employee handbooks are not considered part of the employment contract unless expressly included. **Lorbacher v. Housing Authority of the City of Raleigh**, 663.

The trial court properly dismissed plaintiff's claim that his discharge from the Housing Authority violated the Law of the Land clause of the North Carolina Constitution where he lacked the requisite property interest in continued employment. **Ibid.**

§ 128 (NCI4th). Right to access of courts and legal remedy

A trial court's discretion to close court proceedings and to seal court records is subject to constitutional limitations. **Virmani v. Presbyterian Health Services Corp.**, 629.

The statute that shields hospitals and professional health services providers from third party attempts to acquire medical review committee records and materials in a civil action, G.S. 131E-95, cannot supercede the constitutional rights of access held by the public. **Ibid.**

The open courts provision of Art. I, § 18 of the N.C. Constitution creates a strong presumption that the public has a right of access to civil court proceedings regarding the suspension of a physician's hospital staff privileges, including videotapes and transcripts of the proceedings and medical peer review committee records and materials considered by the court. **Ibid.**

In deciding whether to close court proceedings or seal court records, a court must balance competing interests and policies at stake in light of the particular circumstances of the case but must give substantial weight to the presumption of open access. **Ibid.**

The trial court's orders closing the court proceedings and sealing peer review committee materials in an action regarding suspension of a physician's hospital staff privileges constituted reversible error. **Ibid.**

The trial court erred by summarily denying a newspaper's motion to keep open to the public proceedings regarding the suspension of a physicians' hospital staff privileges. **Ibid.**

CONSTITUTIONAL LAW—Continued

§ 172 (NCI4th). Former jeopardy; attachment of jeopardy; punishment for violation of administrative rule or regulation

A \$400.00 civil penalty imposed upon defendant in an administrative proceeding before the ABC Commission did not constitute punishment for double jeopardy purposes, and the trial court erred in dismissing criminal charges against defendant for selling an alcoholic beverage to a person under the statutory age on the ground of double jeopardy. **State v. Wilson**, 129.

§ 200 (NCI4th). Former jeopardy; particular combinations of charges; kidnapping and rape

Imposition of separate punishments on a defendant for the offenses of first-degree kidnapping and the underlying sexual assault on which the first-degree kidnapping charge was based violates the double jeopardy clauses of the federal and state constitutions. **State v. White**, 565.

§ 226 (NCI4th). Former jeopardy; mistrial based on prosecutorial misconduct

State and federal prohibitions against double jeopardy were not violated where the district court entertained pretrial motions to dismiss based upon prosecutorial misconduct and never accepted evidence for an adjudication of guilt. **State v. Ward**, 115.

COSTS

§ 10 (NCI4th). Allowance of costs in court's discretion

The trial court did not abuse its discretion in failing to award plaintiffs costs for expenses incurred for expert witness fees, discovery, subpoenas, transcripts, reproducing documents for use as exhibits, and postage. **Estate of Smith v. Underwood**, 1.

COUNTIES

§ 86 (NCI4th). Police power; business activities and solicitations

The failure of a county to adopt a comprehensive zoning ordinance did not preclude the county from enacting an ordinance regulating the location of adult and sexually oriented businesses pursuant to its police powers under G.S. 153A-121. **Maynor v. Onslow County**, 102.

COURTS

§ 5 (NCI4th). Subject matter jurisdiction generally

An action is properly dismissed for lack of subject matter jurisdiction when the plaintiff has failed to exhaust its administrative remedies. **Bryant v. Hogarth**, 79.

§ 63 (NCI4th). Jurisdiction; amount in controversy

The trial court did not err by dismissing plaintiff's claim under the federal Fair Debt Collection Practices Act for lack of jurisdiction; damages under that Act are limited to \$1,000 per proceeding. **Meehan v. Cable**, 336.

COURTS—Continued

§ 74 (NCI4th). Superior court jurisdiction to review rulings of another superior court judge generally

The Court of Appeals agreed with plaintiff's alternative argument for reversing a summary judgment for defendant based on improper service where another judge had denied a 12(b)(6) motion based on that defense before this judge granted summary judgment based on the same defense. **Shiloh Methodist Church v. Kever Heating & Cooling**, 619.

§ 111 (NCI4th). Reporting of civil trials

A party seeking recordation of a hearing or trial in the district court must request a reporter or mechanical recordation or the issue will not be considered on appeal. **Holterman v. Holterman**, 109.

§ 131 (NCI4th). Prohibited orders generally

The statute which prevents the sealing of records "required to be open to public inspection" and prohibits a court from restricting the publication of reports regarding matter presented "in open court," G.S. 7A-176.1, does not prohibit a trial court from closing the court proceedings and sealing the records. **Virmani v. Presbyterian Health Services Corp.**, 629.

CRIME AGAINST NATURE

§ 4 (NCI4th). Special protection for children

Assault on a female is not a lesser included offense of taking indecent liberties with a child. **State v. Love**, 437.

The trial court did not err by denying defendant's motions to dismiss a charge of taking indecent liberties with a child and his motion to set aside the guilty verdict where the victim got into bed in the night with her mother and defendant; was allegedly touched by defendant; and the victim admitted that she did not know whether defendant was awake. **State v. Connell**, 685.

§ 13 (NCI4th). Instructions to jury generally

The trial court erred in an indecent liberties prosecution by not giving the requested mistake of fact instruction where the State presented only circumstantial evidence that defendant was awake and intended to touch the child instead of the mother. **State v. Connell**, 685.

CRIMINAL LAW

§ 67 (NCI4th Rev.). Jurisdiction; superior courts, generally

The superior court erred in exercising jurisdiction over defendant's speeding offense where the record revealed that the State had taken a voluntary dismissal on the speeding charge in the district court and the dismissal was not granted pursuant to a plea arrangement with defendant. **State v. Phillips**, 391.

§ 429 (NCI4th Rev.). Argument of counsel; comment on defendant's failure to offer any evidence

The prosecutor's jury argument in a prosecution for false pretense that defendant "offered you no reason why he did not do that work" was a proper comment on defendant's failure to produce witnesses or exculpatory evidence to contradict the State's evidence. **State v. Barfield**, 399.

CRIMINAL LAW—Continued

§ 435 (NCI4th Rev.). **Argument of counsel; comment on defendant's failure to testify; curative instructions**

Any improper reference in the prosecutor's closing argument to defendant's failure to testify was cured by the trial court's instructions. **State v. Barfield**, 399.

§ 445 (NCI4th Rev.). **Argument of counsel; comment on character and credibility of witnesses generally**

The trial court did not err in not correcting remarks made by the State in its closing argument which characterized a defense witness as a drug dealer where evidence supported the argument. **State v. Williams**, 464.

§ 473 (NCI4th Rev.). **Argument of counsel; comments regarding defense attorney**

The prosecutor's jury argument that "I hope you are not as callous, as not only the defendant, but as reflected in the closing argument of his attorney" was not grossly improper. **State v. Barfield**, 399.

§ 666 (NCI4th Rev.). **Prerequisites to appellate review; insufficient evidence motion; waiver**

When defendant presents evidence at trial, he waives his right on appeal to assert the trial court's error in denying his motion to dismiss at the close of the State's evidence. **State v. Barfield**, 399.

§ 785 (NCI4th Rev.). **Instructions on unconsciousness**

There was plain error in a prosecution for indecent liberties in the trial court's failure to instruct the jury on diminished capacity and unconsciousness where the victim got into bed with her mother and defendant after both were asleep and later stated that defendant had touched her improperly, and admitted that she did not know whether defendant was asleep or awake. **State v. Connell**, 685.

§ 798 (NCI4th Rev.). **Instructions on accident generally**

It can be inferred that a defendant charged with indecent liberties was requesting the mistake of fact instruction where the defendant asked the judge to instruct the jury that if defendant "didn't mean to touch the child, he's not guilty." **State v. Connell**, 685.

§ 819 (NCI4th Rev.). **Instruction on lesser degrees of crime; cure of error**

Defendant's acquittal of second-degree sexual offense rendered harmless any error in the trial court's failure to instruct the jury on the lesser included offenses of assault on a female and simple assault. **State v. Love**, 437.

§ 876 (NCI4th Rev.). **Instructions on jury's deliberations; instruction on reasoning together**

The trial court's instruction to the jury before it retired to deliberate that the jurors "must talk it over, deliberate, and reach a unanimous verdict" did not coerce a verdict and was not plain error. **State v. Applewhite**, 677.

§ 898 (NCI4th Rev.). **Review of jury instructions; plain error rule; illustrative cases**

The trial court did not commit plain error by its reference in the instructions to "God's justice." **State v. Applewhite**, 677.

CRIMINAL LAW—Continued

§ 906 (NCI4th Rev.). Composition of the record on appeal

The Court of Appeals could not consider alleged errors in the trial court's failure to give certain instructions where the record did not contain a transcript of the entire jury charge. **State v. Deese**, 536.

§ 1095 (NCI4th Rev.). Structured Sentencing Act; aggravating factors

The trial court did not err in a second-degree murder prosecution arising from an automobile accident by finding as an aggravating factor that defendant knowingly created a great risk to death to more than one person by means of a device normally hazardous to the lives of more than one person. **State v. Ballard**, 316.

There was sufficient evidence of the aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense of second-degree murder in a prosecution arising from the death of twelve-year-old in a car accident while defendant was intoxicated. **Ibid**.

The trial court erred by finding the statutory aggravating factor that the victim was "very old" in sentencing defendant for second-degree murder where the evidence showed only that the victim was seventy-three years old. **State v. Deese**, 536.

The trial court did not err when sentencing defendant for second-degree kidnapping and first-degree rape by finding as an aggravating factor that defendant kidnapped and raped a victim after a period of premeditation and deliberation where the victim was random but a reasonable inference could be drawn that he had previously contemplated kidnapping and raping someone. **State v. Ruff**, 575.

The trial court did not err by finding as a statutory aggravating factor for attempted armed robbery and assault with a deadly weapon inflicting serious injury that defendant failed to assist the victim to save his life after the victim was shot and near death. **State v. Applewhite**, 677.

§ 1096 (NCI4th Rev.). Structured Sentencing Act; enhanced sentence; presence of firearm

The trial court improperly applied the firearms enhancement statute to a second-degree kidnapping conviction where it appeared to the victim during the kidnapping that defendant had displayed a gun, but she testified at trial that the item was actually a cigarette lighter. **State v. Williams**, 464.

The trial court erred when sentencing defendant for second-degree kidnapping by adding a 60-month firearms enhancement where defendant was convicted of first-degree rape based upon use of a dangerous weapon, convicted of first-degree kidnapping based upon the commission of a sexual assault, and the trial court arrested judgment on the first-degree kidnapping, sentenced defendant for second-degree kidnapping, and increased that sentence under the firearms enhancement statute. **State v. Ruff**, 575.

§ 1097 (NCI4th Rev.). Structured Sentencing Act; mitigating factors

The trial court did not err in a second-degree murder prosecution arising from an automobile accident by failing to find as a statutory mitigating factor that defendant voluntarily acknowledged wrongdoing. **State v. Ballard**, 316.

The trial court did not abuse its discretion in a prosecution for second-degree murder resulting from defendant's operation of his vehicle while he was intoxicated by failing to find as a statutory mitigating factor that defendant suffered from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability. **Ibid**.

CRIMINAL LAW—Continued

The trial court did not err by failing to consider the statutory mitigating factor of strong provocation in sentencing defendant for second-degree murder where the evidence showed that the victim had abandoned the confrontation and that it was defendant who provoked the final confrontation resulting in the victim's death. **State v. Deese**, 536.

The trial court did not err when sentencing defendant for second-degree kidnapping and first-degree rape by not finding as a mitigating factor that defendant was a person of good character and reputation in his community. **State v. Ruff**, 575.

The trial court did not err when sentencing defendant for second-degree kidnapping and first-degree rape by not finding the mitigating factor that brain surgery and the need to take seizure preventing medication were mental conditions which mitigated his culpability. **Ibid**.

The trial court did not err by failing to find the statutory mitigating factor that defendant has a support system in the community. **State v. Applewhite**, 677.

§ 1457 (NCI4th Rev.). Restitution generally

Defendant failed to preserve for appeal the issue of the trial court's recommendation that defendant make restitution to certain entities for the victim's medical expenses as a condition of post-release supervision. **State v. Applewhite**, 677.

§ 1608 (NCI4th Rev.). Term of parole; multiple sentences

The trial court erred in a declaratory judgment action to determine plaintiff's parole eligibility from consecutive armed robbery sentences by not finding that defendants were required to aggregate consecutive sentences for armed robberies committed prior to 1 October 1994 for purposes of determining parole eligibility. **Robbins v. Freeman**, 162.

DAMAGES**§ 85 (NCI4th). Punitive damages; fraud**

The trial court properly submitted the issue of punitive damages to the jury where there was evidence of constructive fraud by defendant. **Estate of Smith v. Underwood**, 1.

DECLARATORY JUDGMENT ACTIONS**§ 8 (NCI4th). Requirement of actual justiciable controversy; where controversy concerns ordinance**

There was no real controversy between the parties and the trial court was without jurisdiction to adjudicate the issue presented where plaintiff owned and operated a nightclub which featured female impersonators and sought a declaratory judgment action against enforcement of a 1977 ordinance. The 1977 definition of adult establishment has been replaced and the 1977 meaning is moot. **Carolina Spirits, Inc. v. City of Raleigh**, 745.

§ 20 (NCI4th). Parties

The trial court did not err by granting a motion for relief from a declaratory judgment for a party previously dismissed for lack of subject matter jurisdiction. **Inland Greens HOA v. Dallas Harris Real Estate-Construction**, 610.

DECLARATORY JUDGMENT ACTIONS—Continued

§ 25 (NCI4th). Supplemental relief

Although it would have been more appropriate to file a petition for supplemental relief under G.S. 1-259, a Rule 60 motion for relief was granted since the party was entitled to relief under the Declaratory Judgment Act. **Inland Greens HOA v. Dallas Harris Real Estate-Construction**, 610.

DEEDS

§ 15 (NCI4th). Vague or uncertain description

The trial court's conclusion that the original deed from defendant to plaintiff's predecessors in title was void because of an ambiguity in the beginning point in the description was erroneous where defendant and the grantees were aware of the location of this tract despite the ambiguous description. **Chicago Title Ins. Co. v. Wetherington**, 457.

§ 17 (NCI4th). Presumption of consideration

The trial court erred by finding that a deed was a deed of gift and void because it was not recorded within two years of its execution where defendant failed to overcome the presumption that the recital of consideration in the deed was correct. **Chicago Title Ins. Co. v. Wetherington**, 457.

§ 57 (NCI4th). Restrictive covenants generally

A pier built one foot from and not touching a property violates a restriction on that property prohibiting the placement of any pier "connected to" said property. **Agnoff Family Revocable Trust v. Landfall Assoc.**, 743.

§ 74 (NCI4th). Restrictive covenants in subdivisions; mobile homes

Defendants' modular home was not a "trailer" prohibited by a subdivision restrictive covenant. **Briggs v. Rankin**, 477.

DIVORCE AND SEPARATION

§ 121 (NCI4th). Distribution of marital property; inheritances and gifts

The trial court did not err in classifying all of the parties' investments as marital property where plaintiff had received two inheritances during the marriage but was unable to trace those inheritances to present assets jointly owned by the parties. **Holterman v. Holterman**, 109.

§ 135 (NCI4th). Distribution of marital property; court's duty to value property

The evidence in an equitable distribution proceeding supported the trial court's adjustment of the value of the marital home downward to reflect the amount of necessary repairs to the home. **Becker v. Becker**, 409.

§ 136 (NCI4th). Distribution of marital property; measure of value

The trial court's valuation of certain real property in an equitable distribution action was remanded for a determination of fair market value including the obligation to build an access road. **Carlson v. Carlson**, 87.

§ 139 (NCI4th). Distribution of marital property; goodwill

The trial court in an equitable distribution action reasonably approximated the goodwill value of plaintiff's medical practice on the basis of competent evidence

DIVORCE AND SEPARATION—Continued

and a sound valuation method and did not abuse its discretion. **Carlson v. Carlson**, 87.

§ 145 (NCI4th). Distribution of marital property; distribution factors; income and earning potential

The trial court's finding that the wife needed to occupy and own the marital home and household effects based on her lack of ability to earn an income with which to purchase a residence or furniture was a proper distributional factor for the court to consider in determining that an unequal division of the marital estate was equitable, but the court's finding that the wife has no other place to live other than the marital residence was not a proper distributional factor. **Becker v. Becker**, 409.

§ 147 (NCI4th). Distribution of marital property; distribution factors; liabilities

The trial court properly concluded that defendant's dental debt which was incurred prior to the separation of the parties was not a marital debt. **Becker v. Becker**, 409.

§ 161 (NCI4th). Distribution of marital property; distribution factors; application in particular cases

The trial court did not abuse its discretion by awarding plaintiff wife only 59% of the marital estate where the court considered the statutory factors applicable to the parties. **Holterman v. Holterman**, 109.

§ 165 (NCI4th). Distribution of marital property; distributive awards generally

The trial court abused its discretion in an equitable distribution proceeding by ordering plaintiff to pay a distributive award which cannot be completed within six years after the divorce of the parties. **Becker v. Becker**, 409.

§ 275 (NCI4th). Amount of alimony; particular findings and evidence; earnings

The trial court erred in calculating plaintiff's gross income when reducing his alimony payments by not including the portion of plaintiff's gross income pledged to a bank in a reserve. By deducting the cash reserve pledged to the bank by plaintiff's corporation from his annual gross income, the trial court in effect placed the burden of this voluntarily assumed business investment on defendant, the dependent spouse. **Barham v. Barham**, 20.

§ 280 (NCI4th). Amount of alimony; particular findings and evidence; standard of living

The trial court erred when determining a change in alimony by modifying defendant's accustomed standard of living from that determined in the prior order based on findings that defendant had not returned to the standard of living she enjoyed during the marriage and that plaintiff had only begun to approximate his previous standard of living after he remarried. **Barham v. Barham**, 20.

§ 291 (NCI4th). Modification or termination of alimony; what constitutes changed circumstances generally

The trial court did not err by failing to apply the consumer price index to make cost of living adjustments when comparing defendant's reasonable alimony needs as determined in a 1990 order to her needs as of this 1995 order. **Barham v. Barham**, 20.

DIVORCE AND SEPARATION—Continued**§ 346 (NCI4th). Considerations in awarding child custody; birth of illegitimate children**

A child custody restriction that the plaintiff's illegitimate child be properly legitimated was inappropriate. **Woody v. Woody**, 626.

§ 392.1 (NCI4th). Presumptive child support guidelines; use and effect of

The trial court erred when calculating child support under the North Carolina Child Support Guidelines by failing to consider all of plaintiff's gross income in 1993 and 1994 rather than the net amount retained after a creditor bank encumbered a portion of defendant's corporation's cash reserves. Although technically encumbered, the cash reserves are available to plaintiff under the Guidelines because it was plaintiff's choice to pledge them to the bank in exchange for business financing. **Barham v. Barham**, 20.

§ 392.1 (NCI4th). Child support guidelines

The trial court erred in deviating from the child support guidelines where the court ordered the father to pay less than the amount provided in the guidelines based on findings that the minor children and their mother resided with the mother's boyfriend who earns over \$16 per hour and works forty hours per week, but the court failed to make findings as to the extent of support the children received from the boyfriend. **State ex rel. Horne v. Horne**, 387.

§ 401 (NCI4th). Child support; consideration of party's actual income; intentional depression of income

The trial court erred by finding that plaintiff father depressed his income in bad faith and by using the earning capacity rule in calculating his child support obligation where the father's position was abolished and he twice accepted lower-paying positions with the same employer without attempting to find a job that would pay him what he was previously earning. **Sharpe v. Nobles**, 705.

§ 424 (NCI4th). Enforcement of child support order; contempt; willfulness of failure to comply; present ability to comply

There was sufficient evidence of willfulness to support the trial court's order finding plaintiff father in civil contempt for failure to comply with a consent order requiring him to pay his daughter's college expenses. **Ross v. Voiers**, 415.

The trial court did not err by finding plaintiff father in willful civil contempt for violating a court order to invest \$50 per month for his child's college education and to provide the mother with a certification as to where the money was invested. **Sharpe v. Nobles**, 705.

§ 427 (NCI4th). Child support; modification of support order generally

A trial court did not abuse its discretion by not increasing child support effective as of the date of the motion. **Barham v. Barham**, 20.

§ 449 (NCI4th). Termination of child support obligation; obligation to pay college expenses

A consent order requiring plaintiff father to pay the post-majority college expenses for his daughter was valid and enforceable by contempt. **Ross v. Voiers**, 415.

§ 538 (NCI4th). Counsel fees and costs; right to ultimate relief demanded

The issue of whether the trial court erred by denying defendant attorney fees was not addressed where modification of her alimony was reversed. **Barham v. Barham**, 20.

DIVORCE AND SEPARATION—Continued**§ 563 (NCI4th). Recognition and enforcement of foreign orders; alimony and child support generally**

The trial court erred by granting defendant's motion to dismiss a petition requesting registration and enforcement of a 1985 child support order involving sons 18 and older where the trial court was apparently operating under the repealed URESA rather than UIFSA. UIFSA governs proceedings over any foreign support order registered in North Carolina after 1 January 1996 and is applicable to an order issued prior to that date. **Welsher v. Rager**, 521.

§ 564 (NCI4th). Alimony and child support orders; full faith and credit

The trial court erred in failing to use New York law under the Federal Full Faith and Credit for Child Support Orders Act in interpreting a child support order involving defendant's eighteen and twenty-one year old sons. **Welsher v. Rager**, 521.

EASEMENTS**§ 10 (NCI4th). Creation by deed or agreement; construction; unambiguous instruments**

An instrument conveyed a defeasible easement, either determinable or subject to conditions subsequent. **Howell v. Clyde**, 717.

§ 48 (NCI4th). Termination of easement; occurrence of stated event or violation of conditions

Recordation of a purported termination of a defeasible access easement, whether determinable or subject to conditions subsequent, was not required to make such termination effective as against a bona fide purchaser for value of the property benefited by the easement. **Howell v. Clyde**, 717.

EMINENT DOMAIN**§ 103 (NCI4th). Just compensation where only part of land is taken; unity of ownership, physical unity, or unity of use**

North Carolina considers three factors in determining whether two or more parcels of land should be considered as one unified tract on the date of taking: unity of ownership, unity of use, and physical unity. **Department of Transportation v. Nelson Co.**, 365.

The trial court erred in a land condemnation action involving an office park by concluding that there was no unity of ownership where the parcels were owned by two partnerships and it was undisputed that eleven of the thirteen partners that made up the partnerships owned an interest in both parcels. **Ibid**.

§ 104 (NCI4th). Just compensation where only part of land is taken; intended future use

The trial court erred in a condemnation action in concluding that there was no unity of use for tracts of property which were part of a master development plan conceived as an integrated office complex but which was only partially completed at the time the action was filed. **Department of Transportation v. Nelson Co.**, 365.

§ 126 (NCI4th). Time from which interest accrues

Interest from the "date of taking" allowed by G.S. 40A-53 refers to the date the condemnor acquires the right of possession of the property, not the date the condem-

EMINENT DOMAIN—Continued

nation proceeding was initiated, so that landowners were properly awarded interest from the date of the corrected judgment vesting title in a board of education. **Dare County Bd. of Educ. v. Sakaria**, 585.

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION**§ 84 (NCI4th). Hazardous or toxic substances; oil, natural gas, and drilling wastes; liability; damage caused by statutory violation**

The trial court properly granted defendants' motion for a directed verdict in plaintiffs' action based on strict liability under the Oil Pollution and Hazardous Substances Control Act, negligence, nuisance and trespass for the contamination of their well water by petroleum that allegedly leaked from an underground storage tank on defendant's adjacent property where plaintiffs failed to establish a causal connection between the leakage of gasoline from defendants' underground tank and contaminants found in plaintiffs' well water. **Ellington v. Hester**, 172.

EVIDENCE AND WITNESSES**§ 21 (NCI4th). Judicial notice; administrative regulations**

Refusal of the trial court to judicially notice an Internal Revenue Code circular requiring an attorney or CPA with knowledge of noncompliance or error to promptly advise the client was not prejudicial error where the circular was not relevant to any issue before the court. **Estate of Smith v. Underwood**, 1.

§ 90 (NCI4th). Grounds for exclusion of relevant evidence; prejudice as outweighing probative value

The trial court did not abuse its discretion in a second-degree murder prosecution by excluding defendant's statements to a psychologist where the court allowed the psychologist to give his opinion of defendant's state of mind at the time of the accident but reasoned that the helpfulness of the hearsay testimony was outweighed by the prejudice to the State in not being able to cross-examine defendant. **State v. Ballard**, 316.

§ 116 (NCI4th). Evidence incriminating persons other than accused; creating inference or conjecture

The trial court did not err in a prosecution for first-degree murder and burglary by excluding evidence that his secretary was upset that he was dating another woman and had committed the murder. **State v. Wright**, 592.

§ 339 (NCI4th). Other crimes, wrongs, or acts; to show malice, premeditation, or deliberation

The trial court did not err in a prosecution for first-degree murder and first-degree burglary by admitting evidence that defendant had previously stolen from the victim for the purpose of showing ill will. **State v. Wright**, 626.

§ 340 (NCI4th). Other crimes, wrongs, or acts; to show intent; false pretenses

In a prosecution for false pretense based on defendant's failure to move the victim's house after being paid to do so, testimony by two witnesses that defendant failed to move their houses after they had paid defendant was admissible to show the intent and plan of defendant. **State v. Barfield**, 399.

EVIDENCE AND WITNESSES—Continued**§ 572 (NCI4th). Facts relating to eminent domain**

In an action to determine compensation for property condemned by the Department of Transportation, the trial court properly allowed evidence of the defendant property owners' transactions and activities prior to the condemnation date. **Department of Transportation v. Coleman**, 342.

§ 671 (NCI4th). Renewal of objection where particular evidence subjected to prior determination of admissibility

A defendant's contention in a second-degree kidnapping prosecution that the trial court erred in deferring judgment on his motion in limine regarding the State's argument was not addressed on appeal because defendant made no objections to the argument at trial. **State v. Williams**, 464.

§ 862 (NCI4th). Hearsay; statements not offered to prove truth of matter asserted generally

The trial court did not err in a prosecution for noncapital first-degree murder and other crimes in admitting the recorded oral statement of the since deceased girlfriend of one of the participants. Statements made by codefendants offered to establish the defendant's participation in the planning of a crime are not offered for the truth of the matter asserted. **State v. Hurst**, 54.

§ 875 (NCI4th). Hearsay; statements not offered to prove truth of matter asserted; to show state of mind

Testimony by a witness in a second-degree murder prosecution that her mother told her that defendant threatened by telephone to harm the witness if she came to court was hearsay and improperly admitted under the state of mind exception to the hearsay rule. **State v. Allen**, 182.

§ 1009 (NCI4th). Residual exception to hearsay rule; equivalent guarantees of trustworthiness

Defendant's confrontation rights were violated by the admission of testimony of an unavailable declarant identifying defendant as one of the murderers pursuant to the residual hearsay exception where the trial court relied solely on corroborating evidence in determining the trustworthiness of the hearsay evidence. **State v. Downey**, 167.

There was no prejudicial error in a noncapital prosecution for first-degree murder and other crimes in admitting a recorded oral statement from the deceased girlfriend of a participant indicating that defendant and others had conceived a plan to break into the victim's house, steal cocaine, and kill the victim and her boyfriend. **State v. Hurst**, 54.

§ 1255 (NCI4th). Confessions and other inculpatory statements; right to counsel; post-invocation communication initiated by defendant

The trial court did not err by denying defendant's motion to suppress statements he made to a police detective after invoking his right to counsel where the detective's conduct was not reasonably likely to elicit a response from defendant and is the type of conduct which regularly occurs in the practice of law enforcement. **State v. Stinson**, 252.

§ 2047 (NCI4th). Opinion testimony by lay persons generally

On remand of plaintiff's action against her father for civil assault and emotional distress based on recovered memories of childhood sexual abuse where the trial court

EVIDENCE AND WITNESSES—Continued

had granted a motion in limine excluding the evidence of recovered memories, plaintiff may not proceed with evidence of her alleged repressed memories without accompanying expert testimony on the phenomenon of memory repression. **Barrett v. Hyldburg**, 95.

§ 2088 (NCI4th). Particular subjects of lay testimony; intent generally

The trial court did not err in a prosecution for noncapital first-degree murder and other crimes by admitting the recorded oral statement of the since deceased girlfriend of one of the participants but precluding admission of an exculpatory portion of the statement; the omitted portion of the statement was the witness's statement that defendant may not have originally intended to participate in the plan. **State v. Hurst**, 54.

§ 2176 (NCI4th). Scientific evidence; acceptability of methods used in examination or analysis; new and established methods

A horizontal gaze nystagmus (HGN) test represents specialized knowledge that must be presented to the jury by a qualified expert. **State v. Helms**, 375.

A new scientific method of proof is admissible at trial only if the method is sufficiently reliable and the reasoning or methodology are applicable to the facts in issue. **Ibid.**

The State failed to present a sufficient foundation for the admission in a DWI prosecution of the results of an HGN test administered to defendant where the trial court did not take judicial notice of the reliability of the test, and no inquiry was conducted regarding reliability of the test; however, the admission of the test results was harmless error because other testimony offered at the trial overwhelmingly established defendant's guilt of DWI. **Ibid.**

§ 2250 (NCI4th). Standards of care applicable to medical profession; standards in same or similar community

The trial court properly excluded the testimony of plaintiff's medical expert in a malpractice action where the expert testified that he was familiar with the standard of care in North Carolina but failed to testify that he was familiar with the standard of care in the community in which the alleged negligence took place or in similar communities. **Tucker v. Meis**, 197.

§ 2403 (NCI4th). Testimony by a witness omitted from list provided

The trial court did not abuse its discretion in a negligence action by denying defendant's motion in limine to exclude testimony of a witness where defendant had notice that plaintiff would call the witness since the name was originally provided to plaintiff by defendant through an employee list and plaintiff had provided defendant with a draft of the witness's statement. **Carter v. Food Lion, Inc.**, 271.

§ 2410 (NCI4th). Number of witnesses

The trial court abused its discretion in a child custody proceeding by limiting the number of witnesses and refusing to permit plaintiff to offer rebuttal evidence. **Woody v. Woody**, 626.

§ 3170 (NCI4th). What amounts to corroboration; slight variances

The trial court did not err in a prosecution for indecent liberties by admitting the testimony of a social worker who was called to corroborate the victim's testimony; the differences between the victim's testimony at trial and her statements to the social worker were only slight variations. **State v. Connell**, 685.

FALSE PRETENSES, CHEATS, AND RELATED OFFENSES**§ 18 (NCI4th). Sufficiency of evidence generally**

The evidence was sufficient to support defendant's conviction of the crime of false pretense by obtaining money for a false promise to move a house. **State v. Barfield**, 399.

FISH AND FISHERIES**§ 21 (NCI4th). Cultivation of shellfish**

While the State holds title to lands under navigable waters in public trust, the State may permit the exclusive use of such lands by private individuals for specified purposes, such as shellfishing. **Bryant v. Hogarth**, 79.

The Marine Fishery Division's designation of a submerged area for which plaintiffs have a franchise to cultivate shellfish as a primary nursery area and the denial of a permit to harvest shellfish within the area by mechanical means did not constitute a taking under G.S. 113-206(d) which was subject to judicial review under G.S. 113-206(e) without resort to the administrative remedies of G.S. Ch. 150B; furthermore, plaintiffs' complaint failed to state a claim for a compensable taking under G.S. 113-206(e). **Ibid.**

The superior court did not have subject matter jurisdiction to review the Marine Fisheries Division's denial of plaintiffs' applications to allow mechanical harvesting of shellfish in submerged lands for which plaintiffs had a franchise to cultivate shellfish where plaintiffs failed to pursue administrative appeals of the denials of their applications and failed to plead futility or inadequacy as grounds for failing to pursue administrative review. **Ibid.**

FRAUD, DECEIT, AND MISREPRESENTATION**§ 5 (NCI4th). Constructive or legal fraud**

Plaintiff trust beneficiaries could not recover against defendant accountants for breach of fiduciary duty in failing to properly advise plaintiffs of a known impending tax assessment against the trust where plaintiffs' evidence failed to prove the second element of constructive fraud by showing how this nondisclosure was tied to the consummation of any transaction. **Estate of Smith v. Underwood**, 1.

HIGHWAYS, STREETS, AND ROADS**§ 1 (NCI4th). Rights of way generally**

The trial court did not err by ruling that DOT had existing rights-of-way 50 feet from the center of each side of Wendover Avenue rather than the 30 feet claimed by defendants where defendants' deeds referred to unrecorded plats showing the 100-foot right-of-way. **Dept. of Transportation v. Haggerty**, 499.

§ 12 (NCI4th). Closing of public roads

The trial court properly granted summary judgment for plaintiff in an action in which plaintiff sought injunctions to prohibit the town from constructing a park at the end of a dedicated unopened portion of a street. If a property is dedicated for a particular purpose, it cannot be diverted from that purpose except by eminent domain. **Wooten v. town of Topsail Beach**, 739.

The trial court erred by enjoining defendant from constructing a park on the unused portion of a dedicated street until it complies with the applicable statutes for

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closing a dedicated street because, by statute, the land would go to property owners on the sides of the dedicated street if a portion of the street is closed. **Ibid.**

HOMICIDE

§ 370 (NCI4th). Sufficiency of evidence; aiders and abettors; second-degree murder

There was sufficient evidence under the “friend exception” to support defendant’s conviction of second-degree murder based upon aiding and abetting. **State v. Allen**, 182.

§ 523 (NCI4th). Instructions; second-degree murder; malice

There was no plain error where the court instructed the jury in a second-degree murder trial arising from a car accident that it could consider defendant’s guilty pleas to driving with a revoked license, no insurance, a fictitious tag and unsafe tires arising from the same accident as evidence of malice where defendant did not limit the use of the stipulated evidence. **State v. Ballard**, 316.

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS

§ 39 (NCI4th). Hospital privileges

Hospital bylaws governing the suspension and termination of a physician’s staff privileges were a part of the physician’s contract with the hospital even though the hospital was required by statute to have such bylaws and the physician was required by statute to comply with the bylaws. **Virmani v. Presbyterian Health Services Corp.**, 71.

A hospital bylaw providing that no representative of the hospital or its staff will be liable for damages or any other relief for any action, statement or recommendation within the scope of his or her peer review duties did not grant immunity to the hospital for breach of contract by failing to follow its bylaws in terminating a physician’s staff privileges. **Ibid.**

Where the trial court found that defendant hospital did not follow the peer review procedure provided by its bylaws in terminating a physician’s staff privileges, the court did not have the authority to require the hospital to conduct a new peer review process utilizing personnel different from that called for in the bylaws. **Ibid.**

Defendant hospital was not entitled to attorney fees under the Health Care Quality Improvement Act in an action arising from the termination of plaintiff physician’s hospital staff privileges. **Ibid.**

§ 40 (NCI4th). Medical and peer review committees

Even if physician peer review materials became public records under G.S. Ch. 132 once they were introduced by defendant hospital as evidence in an action regarding a physician’s hospital staff privileges, the trial court was not absolutely required by Ch. 132 to allow unfettered public access to the medical peer review committee materials. **Virmani v. Presbyterian Health Services Corp.**, 629.

The statute that shields hospitals and professional health services providers from third party attempts to acquire medical review committee records and materials in a civil action, G.S. 131E-95, cannot supercede the constitutional rights of access held by the public. **Ibid.**

HOSPITALS AND MEDICAL FACILITIES OR INSTITUTIONS—Continued

The open courts provision of Art. I, § 18 of the N.C. Constitution creates a strong presumption that the public has a right of access to civil court proceedings regarding the suspension of a physician's hospital staff privileges, including videotapes and transcripts of the proceedings and medical peer review committee records and materials considered by the court. **Ibid.**

The trial court's orders closing the court proceedings and sealing peer review committee materials in an action regarding suspension of a physician's hospital staff privileges constituted reversible error. **Ibid.**

§ 62 (NCI4th). Tort liability generally

The evidence was sufficient for the jury on the issue of negligence by defendant rest home and its employees in failing to restrain a ninety-eight-year-old resident at the time she fell and was seriously injured. **Swann v. Len-Care Rest Home**, 471.

INFANTS OR MINORS**§ 120 (NCI4th). Abused and neglected children**

The trial court's conclusion that DSS made reasonable efforts to prevent a child's removal from her home was supported by evidence reflected in the findings. **In re Helms**, 505.

§ 122 (NCI4th). Authority over parents of juvenile

There were sufficient findings in a juvenile neglect order to support the conclusion that reunification requirements are in the child's best interests. **In re Helms**, 505.

§ 128 (NCI4th). Dispositional alternative; custody

A county which was found to be secondarily liable for the appropriate treatment of a twelve-year-old juvenile adjudicated delinquent was not denied due process where the court subsequently allowed the county to intervene, afforded it the opportunity to present evidence and to be heard, and modified the original order. **In re D.R.D.**, 296.

The trial court did not err in ordering defendant Stokes County to pay the costs of private treatment for a juvenile adjudicated delinquent for committing a second-degree sexual offense where the court ordered that the care be given in an existing private institution after considering alternative programs and relative costs. **Ibid.**

The trial court's conclusion that it was in a child's best interest to continue in the custody of DSS pending respondent's compliance with reunification measures was supported by findings that the child lived in an environment injurious to her welfare. **In re Helms**, 505.

INSURANCE**§ 485 (NCI4th). Automobile liability insurance; what constitutes injury arising out of ownership, maintenance, or use of vehicle**

An automobile liability policy covered injuries sustained by a passenger in a vehicle driven by the insured's employee when a handgun that the employee routinely transported in the vehicle and stored in the glove box fired accidentally while the employee was removing it from its holster. **Hartford Fire Ins. Co. v. Pierce**, 123.

§ 535 (NCI4th). Underinsured coverage; effect of insurer waiving rights of subrogation

The trial court erred in dismissing plaintiff's claim in an action to recover underinsured motorist benefits by an insured who settled with the tortfeasor prior to initi-

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ating litigation while reserving the right to seek UIM coverage from the insured's carrier. **Wilmoth v. State Farm Mut. Auto. Ins. Co.**, 260.

§ 725 (NCI4th). Homeowner's policies; coverage of personal injuries

The "expected or intended" injury exclusion in a homeowner's policy precluded liability coverage under the policy for an assault claim against the insured growing out of an altercation at a golf course where the insured admitted that he struck the claimant in the head with his fist. **Erie Ins. Group v. Buckner**, 405.

The term "business" as used in the liability portion of a homeowner's policy refers to an individual's paramount means of earning a livelihood. **N.C. Farm Bureau Mut. Ins. Co. v. Briley**, 442.

The business use exclusion in the liability portion of a homeowner's policy did not apply to exclude coverage for injuries received by a person assisting the insured in his part-time tree trimming work when he was struck by a tree limb cut by the insured. **Ibid**.

§ 896 (NCI4th). General liability insurance; what constitutes "occurrence" within meaning of policy; duty to defend

The trial court did not err by concluding that defendant-insurer was entitled to a judgment in its favor where defendant Harrison loaded bales of fiber onto a trailer which was transported to Kansas City, plaintiff was injured when he opened the rear door of the trailer and a bail of fiber fell onto him, plaintiff alleged that defendant Harrison had negligently loaded the trailer, and defendant-insurer had issued Harrison a premises-operations liability policy with a completed operations exclusion. **Deason v. J King Harrison Co.**, 514.

§ 920 (NCI4th). Duty to defend; excess insurer

An employer's umbrella, excess coverage liability policy imposed no duty on the excess insurer to defend and indemnify the employer for discrimination claims based on sexual discrimination, retaliatory discharge, and intimidation and harassment because those claims do not fall within the "personal injury" coverage provided by the policy; furthermore, the excess insurer had no duty to defend and indemnify the employer for a claim for negligent infliction of emotional distress. **Fieldcrest Cannon, Inc. v. Fireman's Fund Insurance Co.**, 729.

§ 949 (NCI4th). Sufficiency of evidence; to provide excess coverage

Coverage was not provided under an excess workers' compensation policy for the employer-hospital's liability under an ordinary negligence claim by the estate of an employee who was abducted, raped, and murdered by another employee. **Wake County Hosp. Sys. v. Safety Nat. Casualty Corp.**, 33.

An employer's umbrella, excess coverage liability policy imposed no duty on the excess insurer to defend and indemnify the employer for discrimination claims based on sexual discrimination, retaliatory discharge, and intimidation and harassment because those claims do not fall within the "personal injury" coverage provided by the policy; furthermore, the excess insurer had no duty to defend and indemnify the employer for a claim for negligent infliction of emotional distress. **Fieldcrest Cannon, Inc. v. Fireman's Fund Insurance Co.**, 729.

§ 1165 (NCI4th). Sufficiency of evidence to show entitlement to recovery under underinsured motorist provisions

In a declaratory judgment action to determine underinsured motorist coverage, there was no merit to plaintiff's argument that he had a reasonable expectation of cov-

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erage under his father's policy because his name was listed on the declarations page as a driver. **Bruton v. N.C. Farm Bureau Mut. Ins. Co.**, 496.

§ 1168 (NCI4th). Automobile insurance; sufficiency of evidence; lawful possession of vehicle

In a declaratory judgment action rising out of an automobile accident, the trial court correctly held that there was no issue of material fact as to whether plaintiff was in lawful possession of the vehicle she was driving at the time of the accident. **Toole v. State Farm Mut. Auto. Ins. Co.**, 291.

§ 1175 (NCI4th). Automobile insurance; sufficiency of evidence; subjective reasonable belief of entitlement to use vehicle

There was not a genuine issue of material fact as to whether plaintiff had a subjective reasonable belief that she was entitled to use the vehicle she was driving at the time of the accident. **Toole v. State Farm Mut. Auto. Ins. Co.**, 291.

§ 1186 (NCI4th). Sufficiency of evidence to show person was resident of same household as insured

The trial court did not err in a declaratory judgment action to determine coverage under an underinsured motorist policy issued to plaintiff's father by finding that plaintiff was not a resident of his father's household. **Bruton v. N.C. Farm Bureau Mut. Ins. Co.**, 496.

INTENTIONAL MENTAL DISTRESS

§ 2 (NCI4th). Sufficiency of claim

The trial court did not err by dismissing plaintiff's claim for intentional infliction of emotional distress arising from his discharge from the Housing Authority, allegedly for disclosing the Housing Authority's negligent operations, where the conduct did not rise to the required level of extreme and outrageous conduct and plaintiff did not allege intentional conduct. **Lorbacher v. Housing Authority of the City of Raleigh**, 663.

INTOXICATING LIQUOR

§ 63 (NCI4th). Compensation for injury caused by sales to underaged person; who is an aggrieved party

The trial court did not err by granting summary judgment for defendant in an action under the Dram Shop Act where the court concluded that plaintiff was not an aggrieved party within the meaning of the Act because the evidence indicated that plaintiff's decedent assisted the underage driver in purchasing the alcohol which contributed to the accident. **Estate of Darby v. Monroe Oil Co.**, 301.

§ 64 (NCI4th). Compensation for injury caused by sales to underaged persons; grounds for relief

The trial court did not err in granting defendants' motion for summary judgment in a wrongful death action brought by the decedent's estate where the decedent was killed in an alcohol related accident in which an underage driver purchased alcohol from stores owned by defendants. **Estate of Mullis v. Monroe Oil Co.**, 277.

JUDGES, JUSTICES, AND MAGISTRATES

§ 6 (NCI4th). Regular judges holding court by exchange or assignment

A superior court lacked jurisdiction to grant plaintiff's Rule 60 motion for relief from a judgment entered in Warren County Superior Court where the motion was heard in Edgecombe County Superior Court and the judge held no commission or other authorization to hold a session of superior court in that district during that week. **Vance Construction Co. v. Duane White Land Corp.**, 493.

JUDGMENTS

§ 166 (NCI4th). Time for granting default judgment in action against more than one defendant

An order entering a default judgment was vacated where plaintiffs sued three parties, a default judgment was entered against one, and plaintiffs took a voluntary dismissal without prejudice as to the other two. **Harlow v. Voyager Communications V**, 623.

§ 207 (NCI4th). Essential elements of res judicata; identity of issues

The trial court properly concluded that defendant's equitable defenses to foreclosure were precluded under the doctrines of res judicata and collateral estoppel where defendant raised the equitable defenses at the foreclosure hearing. The clerk of court is without jurisdiction to consider equitable defenses in a foreclosure hearing and the elements of collateral estoppel are not met where the court adjudicating the prior proceeding lacked jurisdiction over an issue. **Meehan v. Cable**, 336.

§ 222 (NCI4th). Res judicata and collateral estoppel; persons affected

North Carolina authorizes the non-mutual, offensive use of collateral estoppel. **Rymer v. Estate of Sorrells**, 266.

The trial court abused its discretion in an action arising from an automobile accident by allowing plaintiff Rymer to assert offensive collateral estoppel on the issue of last clear chance where plaintiff Rymer could have intervened in a prior action but did not and defendant had had no opportunity or incentive to raise these arguments. **Ibid**.

§ 224 (NCI4th). Res judicata or collateral estoppel; who is bound by judgment; particular cases

A discharged attorney's quantum meruit claim for a portion of the contingent fee collected by the attorney who settled a personal injury case was not barred by res judicata. **Pryor v. Merten**, 483.

§ 274 (NCI4th). Determination of whether collateral estoppel applies to specific issues

Plaintiffs' claims to recover trustee commissions and attorney fees was not barred by collateral estoppel where the issue of disgorgement of trustee commissions and attorney fees had not been determined in a prior special proceeding in which plaintiffs unsuccessfully sought to have the trustee removed. **Estate of Smith v. Underwood**, 1.

§ 419 (NCI4th). Grounds for attack on judgment; mistake, inadvertence, surprise, or excusable neglect; effect of reliance on spouse, assurances of spouse, or attorney of spouse

The trial court did not err in refusing to set aside a judgment against respondent on the ground of excusable neglect for her failure to appear at a hearing to terminate

JUDGMENTS—Continued

her parental rights although respondent was disabled, did not have a driver's license, and was dependent upon her husband and others for transportation, and her husband refused to take her to court. **Mitchell County DSS v. Carpenter**, 353.

§ 431 (NCI4th). Grounds for attack on judgment; mistake, inadvertence, surprise, or excusable neglect; neglect of attorney

The trial court erred in a medical malpractice action by denying plaintiffs' motion for relief based on excusable neglect where the trial court improperly imputed the neglect of plaintiffs' attorneys to plaintiffs and improperly failed to address whether plaintiffs' behavior was excusable or inexcusable. **Briley v. Farabow**, 281.

§ 650 (NCI4th). Award of interest as question of law or fact

Defendants were not prejudiced by the trial court's erroneous instruction that the jury could award prejudgment interest on the principal amount of damages suffered by plaintiff corporation as a result of defendant's professional negligence where the jury did not award interest. **Estate of Smith v. Underwood**, 1.

§ 652 (NCI4th). Right to interest; when interest begins to accrue

The trial court erred in awarding prejudgment interest of only ten days prior to the jury's verdict in a breach of contract case. **Sockwell & Assoc., Inc. v. Sykes Enterprises, Inc.**, 139.

KIDNAPPING

§ 2 (NCI4th). Element of confinement, restraint, or removal

Kidnapping is a single continuing offense lasting from the time of the initial unlawful confinement, restraint or removal until the victim regains his or her own free will; each place of confinement or each act of asportation occurring during a kidnapping does not constitute a separate unit of prosecution. **State v. White**, 565.

§ 14 (NCI4th). Sufficiency of evidence; degree of crime

A kidnapping victim was released in a safe place at the end of her confinement so that the place of her release could not elevate the crime to first-degree kidnapping where the victim was voluntarily dropped off in a motel parking lot in the middle of the afternoon. **State v. White**, 565.

§ 16 (NCI4th). Sufficiency of evidence; confinement, restraint, or removal generally

Defendant committed only one act of kidnapping which encompassed the period beginning when a codefendant removed the victim from her vehicle until the victim was released in a motel parking lot, and the trial court improperly submitted three separate counts of kidnapping to the jury. **State v. White**, 565.

The State's evidence in a prosecution for second-degree kidnapping was sufficient to support the element of removal. **State v. Williams**, 464.

§ 21 (NCI4th). Confinement, restraint, or removal for purpose of doing serious bodily harm to or terrorizing person

The victim's testimony in a prosecution for second-degree kidnapping that defendant pointed what appeared to be a gun in her direction and threatened to kill her and that she was crying and hysterical was adequate to support the conclusion that defendant's intent was to terrorize her. **State v. Williams**, 464.

KIDNAPPING

§ 24 (NCI4th). **Instructions; degrees of crime**

Judgment was arrested on a first-degree kidnapping prosecution and the case remanded for resentencing on second-degree kidnapping where defendant was convicted of first-degree kidnapping, second-degree rape, and indecent liberties and an ambiguity in the instructions made it impossible to determine whether the jury relied on the same sexual act to convict defendant in all of the cases. **State v. Stinson**, 252.

§ 26 (NCI4th). **Instructions; lesser offenses**

The trial court did not err by instructing the jury on first- and second-degree kidnapping but refusing to instruct the jury on felonious restraint where there was no evidence presented by either party that the victim was restrained for any purpose other than a sexual assault. **State v. Stinson**, 252.

LABOR AND EMPLOYMENT

§ 12 (NCI4th). **State wage and hour regulation; enforcement of the Act**

Labor unions were not employees under the Wage and Hour Act and thus did not have standing to bring suit on behalf of employee-members to recover wages allegedly due under the Act. **Laborers' Int'l Union of North America, AFL-CIO v. Case Farms, Inc.**, 312.

§ 68 (NCI4th). **Wrongful discharge or demotion**

Defendant Housing Authority could be sued for wrongful discharge where plaintiff brought a state claim for wrongful discharge and a claim under 42 U.S.C. § 1983 arising from his dismissal from the Housing Authority. A state claim for wrongful discharge may be based on the agency relationship between an entity and its officers and employees. **Lorbacher v. Housing Authority of the City of Raleigh**, 663.

§ 69 (NCI4th). **Wrongful discharge or demotion; actions in which termination procedure was at issue**

A prior Court of Appeals' decision that the trial court erred in granting judgment on the pleadings for defendant on a procedural due process employment claim was unchanged since, unlike *Soles v. City of Raleigh Civil Service Comm.*, 345 N.C. 443, there was a material issue of fact as to whether the policy in question was an ordinance and conferred a property interest in plaintiff's continued employment. **Vereen v. Holden**, 205.

§ 77 (NCI4th). **Discharge barred by public policy**

Summary judgment should not have been granted for defendant Housing Authority on a state wrongful discharge claim where plaintiff alleged that he was dismissed for giving truthful deposition testimony and media statements about Housing Authority maintenance practices and his evidence, although defendant produced refuting evidence, created a genuine issue of material fact as to the motive for his discharge. **Lorbacher v. Housing Authority of the City of Raleigh**, 663.

§ 89 (NCI4th). **Remedies for breach of covenant not to compete**

The evidence supported the trial court's finding that plaintiff janitorial service suffered damages (lost profits) in the amount of \$3,750 as a result of defendant former manager's breach of a covenant not to compete and a settlement agreement with plaintiff in which defendant agreed not to solicit plaintiff's customers. **Southern Bldg. Maintenance v. Osborne**, 327.

LABOR AND EMPLOYMENT—Continued**§ 152 (NCI4th). Unemployment compensation; leaving work voluntarily without good cause attributable to employer generally**

An employee who left her employment because of sexual harassment by her immediate supervisor terminated her employment for good cause attributable to the employer and was not disqualified for unemployment benefits even though she failed to report the sexual harassment to upper management pursuant to the employer's grievance policy. **Marlow v. N.C. Employment Security Comm.**, 734.

LIENS**§ 29 (NCI4th). Action to enforce lien; parties**

The purchasers of a lot in a residential subdivision could not collaterally attack a judgment enforcing a contractor's prior mechanic's lien for engineering and surveying services provided to the subdivision developer on the ground that the judgment erroneously permitted the contractor to enforce its entire lien against their lot. **Seely v. Borum & Assoc., Inc.**, 193.

MORTGAGES AND DEEDS OF TRUST**§ 65 (NCI4th). Foreclosure and sale under power; injunction to restrain sale generally**

The trial court erred by concluding that it lacked jurisdiction to hear claims arising from a foreclosure and that the claims were properly addressed before the clerk of court in the foreclosure proceeding where plaintiff argued that the foreclosure should be enjoined because he was not in default and that allowing the foreclosure to proceed without an accurate accounting would force him to pay more than defendants were due. **Meechan v. Cable**, 336.

MUNICIPAL CORPORATIONS**§ 58 (NCI4th). Annexation; tests in relation to use, size, and population generally**

The trial court did not err when reviewing an annexation ordinance by upholding the City's classification of certain tracts as commercial or institutional under the subdivision test. **Shackelford v. City of Wilmington**, 449.

The trial court did not err when reviewing an annexation ordinance by upholding the City's classification of an Airlie Gardens tract as sufficiently developed for urban purposes to qualify for annexation. **Ibid.**

The trial court did not err in a disputed annexation by upholding the City's classification of a certain tract as commercial where the tract contained a golf course, driving range, and related improvements, with additional acreage for a lake used to irrigate the golf course, a creek headwaters, and a buffer area. **Ibid.**

The trial court properly found in a disputed annexation that a tract was subdivided into lots and tracts five acres or less at the time of annexation where the property was in active development. **Ibid.**

§ 332 (NCI4th). Exercise of police power; regulations relating to public morals; regulation of particular businesses or occupations

The failure of a county to adopt a comprehensive zoning ordinance did not preclude the county from enacting an ordinance regulating the location of adult and sex-

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ually oriented businesses pursuant to its police powers under G.S. 153A-121. **Maynor v. Onslow County**, 102.

A county ordinance regulating the location of adult and sexually oriented businesses was not unconstitutionally overbroad. **Ibid**.

§ 363 (NCI4th). Officers and employees; validity of residence requirements

A city ordinance requiring city employees to reside in the county was invalid under the equal protection clause because the residency requirement did not bear a rational relationship to stated legitimate government purposes. **Lewis v. City of Kinston**, 150.

An ordinance which required city employees to reside within the county but allowed the city manager unlimited discretion in approving or disapproving exemptions from the residency requirement for "extreme hardship" was unconstitutional on its face. **Ibid**.

§ 421 (NCI4th). Tort liability; drains and culverts generally

The trial court did not err in granting summary judgment in favor of defendant-city based on the doctrine of governmental immunity where plaintiff alleged that the city negligently unclogged private storm water drains. **Biggers v. John Hancock Mut. Life Ins. Co.**, 199.

§ 444 (NCI4th). Waiver of governmental immunity; effect of procuring liability insurance generally

An allegation that defendant town maintained liability insurance affording coverage to this action was sufficient to allege waiver of sovereign immunity by the purchase of liability insurance even though the word "waiver" was not used in the complaint. **Anderson v. Town of Andrews**, 599.

§ 445 (NCI4th). Waiver of governmental immunity; effect of procuring liability insurance; extent of waiver

An allegation that defendant town maintained liability insurance affording coverage to this action was sufficient to withstand defendant town's motion to dismiss plaintiffs' claims for damages in excess of the town's insurance policy limits. **Anderson v. Town of Andrews**, 599.

NEGLIGENCE

§ 6 (NCI4th). Negligent infliction of emotional distress

Plaintiff failed to establish a claim for negligent infliction of severe emotional distress based on defendant rest home's failure to promptly give her accurate information about the nature and extent of injuries suffered by her grandmother in a fall. **Swann v. Len-Care Rest Home**, 471.

§ 75 (NCI4th). Sufficiency of allegations; negligent infliction of emotional distress

The trial court properly dismissed plaintiff's negligent infliction of emotional distress claim arising from his employment discharge. **Lorbacher v. Housing Authority of the City of Raleigh**, 663.

§ 97 (NCI4th). Sufficiency of particular evidence; proximate cause

The trial court properly granted summary judgment in favor of a sand pit operator on the issue of whether it was negligent in allowing a truck driver to leave the com-

NEGLIGENCE—Continued

pany pits with an overloaded truck because there was insufficient evidence to support a finding that the overloaded condition was the proximate cause of the accident. **Gordon v. Garner**, 649.

The trial court properly granted summary judgment for a sand pit operator in an action arising from a collision between a dump truck and plaintiff on a claim that the sand pit operator was negligent for paying truckers by the ton rather than by a time period, so that truckers were encouraged to disobey highway safety rules and regulations. **Ibid.**

NEGOTIABLE INSTRUMENTS AND OTHER COMMERCIAL PAPER

§ 58 (NCI4th). **Holder in due course; value**

A negotiable promissory note executed by two business partners and their wives to refinance, pay and cancel three preexisting lines of credit executed by the partners was given for value so that consideration was present as a matter of law. **Franklin Credit Recovery Fund v. Huber**, 187.

OBSCENITY, PORNOGRAPHY, INDECENCY, OR PROFANITY

§ 25 (NCI4th). **Indecent exposure**

The trial court erred by denying defendant's motion to dismiss a prosecution for indecent exposure where defendant exposed his buttocks. **State v. Fly**, 286.

PARENT AND CHILD

§ 97 (NCI4th). **Termination of parental rights; grounds generally**

The natural mother of a child was not estopped from seeking to terminate the respondent's parental rights even though respondent argued that petitioner had a duty to inform him of his rights. **In re Hunt**, 370.

§ 108 (NCI4th). **Failure to establish paternity or to legitimate child; failure to prove support or care**

The trial court's findings that respondent in a parental rights termination had not legitimated his child were supported by the evidence where he did not provide sufficient support to avoid termination of parental rights. **In re Hunt**, 370.

§ 116 (NCI4th). **Termination of parental rights; right to counsel and guardian ad litem, generally; fees**

The trial court erred by denying respondent's request for a court appointed counsel at the hearing to terminate her parental rights even though respondent failed to file an answer or any pleadings and did not request an attorney prior to the hearing. **Little v. Little**, 191.

§ 125 (NCI4th). **Termination of parental rights; adjudicatory hearing; taking evidence, finding facts, and adjudicating existence of grounds**

The trial court did not err in a termination of parental rights proceeding by finding that defendant did not provide substantial support without also finding that he had the means and ability to do so. **In re Hunt**, 370.

PARTIES

§ 12 (NCI4th). Real party in interest; standing generally

An agent of the owner is not a real party in interest and cannot maintain an action without the owner. **Maynor v. Onslow County**, 102.

§ 61 (NCI4th). Permissive intervention based on common question of law or fact

A newspaper met the requirement of a common question of law or fact for permissive intervention under Rule 24(b) in an action regarding the suspension of a physician's hospital staff privileges. **Virmani v. Presbyterian Health Services Corp.**, 629.

§ 70 (NCI4th). Class actions generally

Rule 23 allows a party who is entitled to sue to bring suit on behalf of itself and other parties in the form of a class action but does not grant or deny standing to parties. **Laborers' Int'l Union of North America, AFL-CIO v. Case Farms, Inc.**, 312.

PLEADINGS

§ 63 (NCI4th). Imposition of sanctions in particular cases

It was improper for the trial court to impose Rule 11 sanctions on plaintiff's attorney for his failure to timely notify the trial court and defense counsel of his scheduling conflict, his failure to serve calendar notices on defense counsel rather than on defendants, his failure to comply with a subpoena served on plaintiff's wife, his taking of a voluntary dismissal of plaintiff's claim on the first date set for trial, or his failure to timely serve the summons and complaint on the uninsured motorist carrier and to comply with a request for a proposed pre-trial order. **Williams v. Hinton**, 421.

§ 144 (NCI4th). Jurisdiction over subject matter

An action is properly dismissed for lack of subject matter jurisdiction when the plaintiff has failed to exhaust its administrative remedies. **Bryant v. Hogarth**, 79.

PRINCIPAL AND AGENT

§ 17 (NCI4th). Agent; liability to principal

Defendant CPA who prepared income tax returns and other documents for plaintiff trust beneficiaries' various trusts and corporations was an agent of one of the corporations, not a subagent of the trustee; therefore, negligence by the CPA in failing to file subchapter S election forms or to insure that such forms were filed was not imputed to the corporation through the trustee-agent so as to bar on the ground of contributory negligence its recovery against the CPA and the accounting firm for which he worked for professional negligence. **Estate of Smith v. Underwood**, 1.

PROCESS AND SERVICE

§ 39 (NCI4th). Attacks on service of process

The trial court erred by granting summary judgment for defendant based on improper service of process and the running of the statute of limitations where the initial summons was returned unserved, plaintiff served defendant by certified mail within thirty days, and defendant asserted the defense of improper service because there

PROCESS AND SERVICE—Continued

was no endorsement or alias or pluries summons. **Shiloh Methodist Church v. Keever Heating & Cooling**, 619.

§ 61 (NCI4th). Reference to original summons

The trial court did not err by dismissing a case for insufficiency of process where four summonses were issued by the clerk of court, each summons had a copy of the complaint attached but no reference was made to the original summons, and the box on the summons form for alias or pluries was not checked. **Integon General Ins. Co. v. Martin**, 440.

§ 107 (NCI4th). Service on natural person; personal service generally

The trial court erred in a negligence action arising from an automobile accident by concluding that service of process on defendants was insufficient where the deputy sheriff gave the summons and complaint to defendants' adult daughter who was staying with them during a week-long visit. **Glover v. Farmer**, 488.

PUBLIC OFFICERS AND EMPLOYEES

§ 35 (NCI4th). Personal liability; civil liability generally; negligence

The father, aunt and uncle of a child failed to state a claim for negligence against a deputy sheriff in his individual capacity based upon assistance to the mother in regaining custody of the child, although the caption of the complaint stated that the deputy was being sued individually, where the overall tenor of the complaint focused on the deputy's official duties as a law officer. **Trantham v. Lane**, 304.

QUIETING TITLE

§ 28 (NCI4th). Sufficiency of evidence to take case to jury

Plaintiff title insurer established a prima facie case for removing a cloud on title where defendant contended that the original deed from defendant and his wife to plaintiff's predecessors in title was void because it contained an ambiguity in description and was a deed of gift that was not timely recorded. **Chicago Title Ins. Co. v. Wetherington**, 457.

RAPE AND ALLIED SEXUAL OFFENSES

§ 27 (NCI4th). First-degree sexual offense; aiding and abetting

The evidence supported defendant's conviction of first-degree sexual offense by aiding and abetting a codefendant's penetration of the victim's vagina with his fingers while in defendant's vehicle. **State v. White**, 565.

RECORDS OF INSTRUMENTS, DOCUMENTS, OR THINGS

§ 1 (NCI4th). Public records generally; "public records" defined

Even if physician peer review materials became public records under G.S. Ch. 132 once they were introduced by defendant hospital as evidence in an action regarding a physician's hospital staff privileges, the trial court was not absolutely required by Ch. 132 to allow unfettered public access to the medical peer review committee materials. **Virmani v. Presbyterian Health Services Corp.**, 629.

RETIREMENT

§ 10 (NCI4th). **Local Governmental Employees' Retirement System**

In the statute providing for payment of a death benefit to the beneficiary of a local government employee, an employee's time "in service" is the time for which salary is earned, whether it be earned from time spent actually working or from time credited for sick and annual leave. **Walker v. Bd. of Trustees of the N.C. Local Gov't Emp. Ret. Sys.**, 156.

If a local government employee is separated for reasons other than retirement, the last day of actual service is the date of separation, with no time credited for accumulated vacation or sick leave; if the employee takes medical leave without pay or retires, the last day of service is dependent upon the time credited for accumulated vacation and sick leave. **Ibid.**

When a county employee retired on disability, she was not "terminated" within the meaning of the death benefit statute, and the last day of the employee's actual service was the date on which her sick and annual leave expired. **Ibid.**

ROBBERY

§ 5 (NCI4th). **Robbery with firearms or other dangerous weapons; attempt generally**

An armed robbery defendant's argument that he had a legitimate interest in items taken at the point of a shotgun because the owner had agreed to give them to defendant in exchange for drugs and that defendant therefore could not be guilty of robbery was rejected. **State v. Willis**, 549.

§ 70 (NCI4th). **Sufficiency of evidence to show victim possessed property allegedly taken**

The trial court did not err in an armed robbery prosecution by not granting defendant's motion for a directed verdict where defendant contended that there was no evidence of ownership of the items taken, but there was undisputed evidence that these items were taken by defendant from the owner of the residence while the owner was present and being threatened with a shotgun. **State v. Willis**, 549.

§ 85 (NCI4th). **Attempted armed robbery; sufficiency of evidence to show overt act**

There was sufficient evidence of the elements of intent to deprive another of personal property and an overt act calculated to carry out that intent to support defendant's conviction of attempted armed robbery. **State v. Applewhite**, 677.

§ 162 (NCI4th). **Mandatory minimum sentence**

A defendant who was convicted of robbery charges which arose in 1980 was not entitled to gain-time reduction of his sentence below the statutorily mandated seven-year minimum. **Robbins v. Freeman**, 162.

SHERIFFS, POLICE, AND OTHER LAW ENFORCEMENT OFFICERS

§ 13 (NCI4th). **Civil and criminal liability generally**

The father, aunt and uncle of a child failed to state a claim for negligence against a deputy sheriff in his individual capacity based upon assistance to the mother in regaining custody of the child, although the caption of the complaint stated that the deputy was being sued individually, where the overall tenor of the complaint focused on the deputy's official duties as a law officer. **Trantham v. Lane**, 304.

STATE

§ 27 (NCI4th). Sovereign immunity; entry into contract as implied consent to suit

The complaint of school principals of the Department of Correction alleging that the Department violated provisions of their written employment contracts providing that they were to be compensated at sums complying with the State Salary Schedule stated a claim for breach of contract which falls within the contract exception to the doctrine of sovereign immunity. **McFadyen v. Freeman**, 202.

§ 33 (NCI4th). State Tort Claims Act; agents of State within the Act

The trial court correctly concluded that the Iredell DSS is an agency of the State where plaintiffs sought damages for delayed medical and psychiatric treatment of an adopted child resulting from defendants' failure to provide accurate and complete information and the trial court found that the case fell within the Tort Claims Act. **Parham v. Iredell County Dept. of Social Services**, 144.

§ 39 (NCI4th). State Tort Claims Act; exclusive jurisdiction

An action against defendant-Iredell Department of Social Services and one of its employees for damages arising from the delayed treatment of an adopted child resulting from defendants' failure to disclose her history was remanded for findings of fact regarding the amount of the DSS' insurance policy limit where there was an allegation that defendants waived governmental immunity by purchasing liability insurance but the record is silent as to the amount. **Parham v. Iredell County Dept. of Social Services**, 144.

§ 46 (NCI4th). State Tort Claims Act; contents of affidavit

The trial court rather than the Industrial Commission had jurisdiction over an action against the Iredell County Department of Social Services and one of its employees for damages arising from delayed treatment of an adopted child resulting from defendant's failure to disclose her history where plaintiffs alleged false representations and fraudulent concealment of material information with the intent to deceive plaintiffs, and it cannot be said that these allegations fall short of "malicious and corrupt." **Parham v. Iredell County Dept. of Social Services**, 144.

TAXATION

§ 104 (NCI4th). Valid defense to a local tax; release or refund

The term "clerical error" in G.S. 105-381 refers only to a transcription error, and the mistake must ordinarily be apparent on the face of the instrument and must be unintended. **Ammons v. County of Wake**, 426.

A county tax assessor's inaccurate assertion that plaintiffs' property failed to qualify for present use value taxation as forestland was not a "clerical error" within the meaning of G.S. 105-381, and plaintiffs were not entitled by that statute to a refund of the excess property tax paid as a result of the assessor's misrepresentation. **Ibid.**

TRIAL

§ 43 (NCI4th). Reconsideration of summary judgment motion; vacating prior denial of summary judgment

The trial court did not abuse its discretion by denying plaintiff's motion to reconsider a summary judgment for defendant Housing Authority on a 42 U.S.C. § 1983 claim in light of new evidence. **Lorbacher v. Housing Authority of the City of Raleigh**, 663.

TRIAL—Continued**§ 563 (NCI4th). Excessive or inadequate damages given under influence of passion or prejudice generally**

The trial court did not err in the denial of a trust's motion for a new trial on the issue of damages for professional negligence by defendant attorney and defendant CPA in failing to file a subchapter S corporation election form where the jury awarded the trust the amount of the tax assessment against it but did not award interest on loans used to pay the assessment. **Estate of Smith v. Underwood**, 1.

§ 571 (NCI4th). Other grounds for new trial

The trial court committed reversible error by setting aside a jury verdict on its own motion in favor of plaintiff pursuant to Rule 59(a)(9) based upon a misapprehension of the law that when a contract does not specifically set forth dates that payments are to be due, it is impossible to determine when a breach, if any, has occurred. **Sockwell & Assoc., Inc. v. Sykes Enterprises, Inc.**, 139.

§ 597 (NCI4th). Sufficiency of distinction between findings of fact and conclusions of law

As a general rule any determination requiring the exercise of judgment or application of legal principles is classified a conclusion of law, while any determination reached through logical reasoning from the evidentiary facts is classified a finding of fact. **In re Helms**, 505.

TRUSTS AND TRUSTEES**§ 190 (NCI4th). Compensation of trustees generally**

The trial court properly directed a verdict that defendant trustee's failure to obtain annual approval of the clerk for commissions and to file annual accountings constituted a breach of fiduciary duty as a matter of law. **Estate of Smith v. Underwood**, 1.

§ 191 (NCI4th). Compensation of trustees; counsel fees for attorney serving as trustee

The trial court erred by denying plaintiff trust beneficiaries' motions for judgment n.o.v. as to issues involving the amounts of attorney and co-trustee fees received by defendant from two trusts for which he did not receive approval by the clerk of court. **Estate of Smith v. Underwood**, 1.

The trial court properly directed a verdict that defendant trustee's failure to obtain annual approval of the clerk for attorney fees constituted a breach of fiduciary duty as a matter of law. **Ibid.**

§ 312 (NCI4th). Administration or management of trust by trustee generally; creation of trust

In an action by trust beneficiaries alleging breach of fiduciary duty, the trial court did not err in submitting to the jury issues as to whether defendant trustee acted in an open, fair and honest manner with regard to various transactions involving the trust. **Estate of Smith v. Underwood**, 1.

UNFAIR COMPETITION OR TRADE PRACTICES**§ 39 (NCI4th). Sufficiency of evidence that alleged act was unfair or deceptive**

An insurer did not commit an unfair and deceptive trade practice by selling a policy to plaintiff-hospital representing that the policy provided coverage under Employers' Liability Laws without warning that it would subsequently take the position that the policy did not provide coverage against common law actions not barred by the exclusivity provisions of the Workers' Compensation Act. The policy provides narrow coverage, but narrow coverage in and of itself is not illusory or deceptive. **Wake County Hosp. Sys. v. Safety Nat. Casualty Corp.**, 33.

§ 49 (NCI4th). Treble damages in private action for unfair competition

Defendant former manager's violation of a settlement agreement with regard to breach of a covenant not to compete constituted an unfair and deceptive practice which entitled plaintiff janitorial service to treble damages (lost profits) under G.S. § 75-16 where defendant's actions constituted more than a simple breach of contract and showed an intentional deception by defendant in dealing with plaintiff. **Southern Bldg. Maintenance v. Osborne**, 327.

§ 51 (NCI4th). Attorney's fees to prevailing party generally

The trial court did not abuse its discretion in refusing to award attorney's fees to the prevailing plaintiff in an unfair and deceptive practice action arising from a violation of a covenant not to compete and a settlement agreement where the court found that there was no unwarranted refusal by defendant to fully resolve the matter. **Southern Bldg. Maintenance v. Osborne**, 327.

WORKERS' COMPENSATION**§ 46 (NCI4th). "Statutory employer"; contractor's duty to remote employees**

The trial court properly granted summary judgment for defendants where plaintiff-trucker was injured at a logging site, he did not have a workers' compensation policy covering himself and had not executed a waiver, and plaintiff filed an action to recover damages. **Boone v. Vinson**, 604.

§ 62 (NCI4th). Employer's misconduct tantamount to intentional tort; "substantial certainty" test

Plaintiff employee's evidence was insufficient to establish a Woodson claim for injuries received while operating and cleaning a paint coater without a safety guard. **Regan v. Amerimark Building Products**, 225.

§ 69 (NCI4th). Exclusion of other remedies against fellow employees; willful, wanton, or reckless conduct as tantamount to intentional tort

The trial court properly granted summary judgment for defendant supervisors in plaintiff's action to recover for injuries sustained while manually cleaning a paint coater machine even though the evidence presented by plaintiff showed that both supervisors were aware that the safety guard had been removed from the machine. **Regan v. Amerimark Building Products**, 225.

WORKERS' COMPENSATION—Continued**§ 72 (NCI4th). Action against third party tortfeasor; settlement or release of claim against third party**

The trial court properly granted summary judgment in favor of defendant in a tort action seeking as damages increases in workers' compensation premiums incurred as a result of payments to an employee injured as a result of defendant's negligence where plaintiff had approved a settlement between the injured employee and defendant which released defendant from all claims. **M. B. Haynes Corp. v. Strand Electro Controls, Inc.**, 177.

§ 74 (NCI4th). Actions against third party tortfeasor; who may bring third party action

The trial court correctly granted defendant's motion for summary judgment where plaintiff, the employer of an injured employee, sought to recover increases in workers' compensation premiums from defendant, a negligent third party. **M. B. Haynes Corp. v. Strand Electro Controls, Inc.**, 177.

§ 113 (NCI4th). Test as to whether injury "arises out of" employment; employment as contributing proximate cause of injury

The increased risk test is the appropriate test for determining whether an employee's injuries from an insect sting arose out of his employment. **Minter v. Osborne Co.**, 134.

§ 114 (NCI4th). Test as to whether injury "arises out of" employment; particular applications

Plaintiff failed to show that an insect sting he received while working as a carpenter for defendant employer was an accident or injury arising out of his employment because he failed to show that he was at an increased risk of being stung than a member of the public. **Minter v. Osborne Co.**, 134.

§ 120 (NCI4th). Effect of conflicting evidence as to cause of injury

There was competent evidence to support the Industrial Commission's finding in a workers' compensation action that plaintiff's knee injury is causally related to an automobile accident suffered in the course of his employment where plaintiff had various degenerative changes in his knee but his doctor testified that the injuries were consistent with the accident and plaintiff testified that he had had no previous problems. **Aaron v. New Fortis Homes, Inc.**, 741.

§ 132 (NCI4th). Conduct of fellow employee or third person; assault or intentional acts by a third person

The trial court properly granted summary judgment for a defendant insurer on plaintiff's breach of contract claim arising from crimes committed by one employee against another where the hospital had filed a claim for amounts allegedly due under an excess workers' compensation policy, but discovery materials establish that death benefits payable under the Workers' Compensation Act were within the hospital's self insured retention and the excess coverage would not apply. **Wake County Hosp. Sys. v. Safety Nat. Casualty Corp.**, 33.

No coverage was provided to plaintiff hospital under an excess workers' compensation insurance policy where an employee was abducted, raped, and murdered by another employee, the workers' compensation coverage did not apply and the hospital contended that the estate was entitled to maintain an action outside the Workers' Compensation Act for negligent hiring and retention under policy language concerning employer's liability laws. **Ibid.**

WORKERS' COMPENSATION—Continued**§ 149 (NCI4th). Time, place, and circumstances of injury; service outside of regular duty; special errand rule**

The Industrial Commission did not err by finding in a worker's compensation action that plaintiff's injuries were caused by an accident arising out of and in the course of his employment where he was injured in an automobile accident while taking his supervisor to the hospital. **Aaron v. New Fortis Homes, Inc.**, 741.

§ 228 (NCI4th). Definition of "disability" or "disablement"

There was competent evidence to support the Industrial Commission's finding that a workers' compensation plaintiff remained totally disabled where his doctor had restricted him from any work until he had knee surgery and he had not yet had the surgery. **Aaron v. New Fortis Homes, Inc.**, 741.

§ 236 (NCI4th). Existence of disability; availability of employment as evidence of earning capacity

The Industrial Commission properly concluded that the scrap baling job offered to plaintiff injured employee by defendant employer was a "make-work" job not ordinarily available in the competitive job market and could not be considered as evidence of plaintiff's capacity to earn wages so that plaintiff's rejection of the baler job did not require termination of his temporary total disability benefits. **Smith v. Sealed Air Corp.**, 359.

§ 260 (NCI4th). Calculation of average weekly wages generally

The Industrial Commission erred in a workers' compensation action by denying defendant's motion for a new hearing or to take additional evidence on the issue of plaintiffs' wages where the Form relied upon in determining those wages included income from other sources. **Aaron v. New Fortis Homes, Inc.**, 741.

§ 279 (NCI4th). Death benefits; payment of compensation in absence of dependents

A workers' compensation award was remanded for a clarification of the computation and interest on death benefits paid for an employee who was without dependents. **Strickland v. Carolina Classic Catfish, Inc.**, 615.

§ 304 (NCI4th). Payment of award; interest on final award from date of initial hearing

A workers' compensation award for a deceased employee without survivors was remanded for clarification of the computation, including interest on commuted amounts. **Strickland v. Carolina Classic Catfish, Inc.**, 615.

§ 414 (NCI4th). Review by Industrial Commission; scope of review generally

The Industrial Commission abused its discretion by reversing a deputy commissioner on a cold record without making any references to the credibility of witnesses. **Taylor v. Caldwell Systems, Inc.**, 542.

§ 420 (NCI4th). Industrial Commission's authority to modify award upon change of condition

The findings and conclusions rendered in the original workers' compensation opinion and award were not binding on the Industrial Commission as the law of the case on petitioner's claim for additional benefits due to a change of condition. **Grantham v. R. G. Barry Corp.**, 529.

WORKERS' COMPENSATION—Continued**§ 427 (NCI4th). What constitutes change of condition; evidence supporting change of condition**

There was ample competent evidence to support the Industrial Commission's determination that plaintiff suffered a change of condition pursuant to G.S. 97-47. **Grantham v. R. G. Barry Corp.**, 529.

ZONING**§ 1 (NCI4th). Origination and nature of zoning power; exemptions**

The trial court correctly granted partial summary judgment for defendants on the zoning issue in an action in which plaintiffs alleged that defendants' commercial use of their property to grow plants in greenhouses was a nuisance and in violation of the county zoning ordinance. These activities fall within the bona fide farm purposes exemption. **Sedman v. Rijdes**, 700.

§ 71 (NCI4th). Sufficiency of findings to support denial of special use permit

The trial court erred in reversing the Currituck County Board of Commissioners' denial of an application for a special use permit for a subdivision based upon a determination that the decision of the Board was not supported by substantial evidence. **Tate Terrace Realty Investors, Inc. v. Currituck County**, 212.

The superior court erred by determining that the Currituck County Board of Commissioners acted arbitrarily and capriciously in denying an application for a special use permit for a new subdivision where there was substantial competent evidence in the record supporting the Board's findings, which sustained its conclusion that the proposed subdivision failed to meet the provisions of the county development ordinance because it exceeded the county's ability to provide adequate school facilities. **Ibid.**

§ 94 (NCI4th). Reasonable basis for spot zoning

A county board of commissioners made a clear showing of a reasonable basis for the spot zoning of a 14.9 acre tract of land to allow a neighborhood convenience center. **Purser v. Mecklenburg County**, 63.

§ 113 (NCI4th). Standing to appeal to Board of Adjustment

The trial court erred by finding that intervenors had standing in an action challenging the Chapel Hill Board of Adjustment's denial of a request for a variance where the intervenors were owners of nearby property but there was no evidence of a diminishment of their property values and no showing that they would suffer any special damages distinct from the rest of the community. **Lloyd v. Town of Chapel Hill**, 347.

§ 121 (NCI4th). Judicial review of zoning matters; scope of review

A legislative board such as a board of commissioners sits as a quasi-judicial body when it grants or denies a special use permit and its decisions are subject to review by the superior court by proceedings in the nature of certiorari. **Tate Terrace Realty Investors, Inc. v. Currituck County**, 212.

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